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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

MILES CHRISTI RELIGIOUS ORDER,
FATHER CESAR BERTOLACCI, and
BROTHER FRANCISCO CONTE-GRAND,
Petitioners,

v.

NORTHVILLE TOWNSHIP, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. Box 393
ANN ARBOR, MI 48106
(734) 827-2001
rmuise@thomasmore.org

Counsel for Petitioners

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Petitioners Miles Christi, a Catholic religious order, Father Cesar Bertolacci, and Brother Francisco Conte-Grand seek to prohibit Northville Township and its officials from arbitrarily enforcing the Township's zoning ordinance to compel the religious order to eliminate constitutionally protected religious activities held in their private residence. The district court dismissed Petitioners' constitutional and statutory claims on ripeness grounds. The Sixth Circuit affirmed that ruling 2 to 1, with the Chief Judge authoring a lengthy dissent.

The "ripeness" test employed by the majority in this land use case conflicts with the test employed by the Second Circuit, in that the majority failed to properly account for the important First Amendment rights at stake. The majority opinion also conflicts with decisions of this Court by conflating the exhaustion of administrative remedies with the obtaining of a final decision. In the final analysis, the federal courts are not uniform in the "ripeness" test they apply to First Amendment claims arising in the land use context, thereby warranting review by this Court.

1. What is the proper "ripeness" test for First Amendment claims arising in the land use context?

PARTIES TO THE PROCEEDING

The Petitioners are Miles Christi Religious Order, Father Cesar Bertolacci, and Brother Francisco Conte-Grand (collectively referred to as "Petitioners" or "Miles Christi").

The Respondents are Northville Township; Chip Snider, individually and in his official capacity as Manager for Northville Township; Jennifer Frey, individually and in her official capacity as the Director of Community Development for Northville Township; and Joseph Bauer, individually and in his official capacity as Ordinance Enforcement Officer for Northville Township (collectively referred to as "Respondents" or "Township").

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OPINION BELOW

The opinion, App. 1a, appears at 629 F.3d 533.

JURISDICTION

The opinion of the court was issued on December 21, 2010. A petition for rehearing and suggestion for rehearing *en banc* was denied on January 24, 2011. App. 70a-71a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

Under Article III, the federal judiciary is vested with the "Power" to resolve "Cases" or "Controversies" "arising under [the] Constitution [and] the Laws of the United States." U.S. Const. art. III.

STATEMENT OF THE CASE

A. Miles Christi House.

Since 2002, Miles Christi, an international religious order, has owned a five-bedroom house on a one-acre plot of land in a residential neighborhood in Northville, Michigan ("Township"). Several priests

and brothers (no more than six) of the order live there. The priests conduct private daily Mass in a small eighteen-person oratory[1] inside the house for members of the order. Miles Christi also hosts regular Bible studies for invited friends and their children, with attendance ranging from five (the most common) to fifteen individuals. Nothing on the exterior of the house suggests that this private home is a church or that members of a Catholic religious order live there. App. 3a.

B. Complaints.

In March 2003, some Northville citizens wrote letters to Township officials about the Miles Christi house, complaining about the number of cars parked there and suggesting that the order was not using the house in compliance with the Township's zoning requirements. The Township's planner at the time, Maureen Osiecki, investigated the matter and replied to at least one of the letters by saying that "the priests

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[1] An oratory is a private chapel. It is not a church as a matter of Canon Law. The oratory at the Miles Christi house was designated by permission of Adam Cardinal Maida in August 2002 for the benefit of the Miles Christi religious order, and it is shared with others with the consent of Father Cesar Bertolacci as the local Superior. Pursuant to the Cardinal's decree, the oratory does not enjoy "the normal rights of a parish." It is not open to the public, and thus the faithful do not have the right of entry for the exercise of divine worship as they would for an established church under Canon Law. Consequently, the Miles Christi house, including the oratory, is not a parish or a church. It does not enjoy the full benefits of a church, nor does it keep any Sacramental records as required by a parish. Township officials were aware of these facts in 2003. *See* App. 3a.

may use this home as their residence" and that the house was "not a church, nor a parish." App. 3a.

Over the next few years, Respondent Joseph Bauer, the Township's Ordinance Enforcement Officer, received sporadic complaints about the Miles Christi house—nearly all of them from the next-door neighbors. On several occasions, he drove by the property and made notes regarding his observations, but no violations were cited nor did he take any other action. App. 3a-4a.

In late 2006 and early 2007, the next-door neighbors intensified their complaints against Miles Christi. According to the Township manager, Respondent Chip Snider, the neighbors were "deeply obsessed" and "they [were] tak[ing] up a significant amount of time." Township officials ultimately assured the neighbors that "it was time [they] got some satisfaction." *See generally* App. 4a.

C. Township's Investigation and Surveillance.

In response to the neighbors' complaints, Bauer conducted frequent surveillance of the Miles Christi house, keeping detailed notes of the number of vehicles parked at the property, including taking down license plate numbers of the vehicles. Bauer was not the only one conducting surveillance, however. Respondents also directed the Township police department to go to the Miles Christi house on Sunday to observe and photograph activities related to the private Sunday Mass—a uniformed police officer in a marked police cruiser was assigned the task. And Petitioners themselves took several photographs of an officially marked car driving by their property and recorded the

times—several per day—when the car drove by. App. 4a.

According to Bauer, his investigation revealed that there were typically five to fifteen vehicles parked at the Miles Christi house—fifteen being the most, but five being the most common. The large driveway at the Miles Christi house can accommodate this number of vehicles. Consequently, as a private residence, the Miles Christi house was not violating any zoning regulation since the only parking restriction for a private residence is that the vehicles park on an improved surface.

D. Township's Disapproval of the Use of the Miles Christi House.

Despite the results of Bauer's investigation, in February 2007, Respondent Jennifer Frey, the Township's Director of Community Development, made an admittedly subjective determination and decision on behalf of the Township that the Miles Christi house was no longer a private residence under the zoning ordinance because of Petitioners' religious activities. Instead, the residence would be considered a small church. As a result, the Township would now require Petitioners to submit a full site plan for review in order to obtain the necessary approval for their activities. Making such decisions was within Frey's authority as the Township's Director of Community Development. *See* App. 53a.

E. Township's Subsequent Actions.

On February 27, 2007, Respondents Snider, Frey, and Bauer met with the next-door neighbors.

Following this meeting, Bauer made another visit to the Miles Christi house and delivered a letter to Brother Francisco. In the letter, Bauer described his surveillance of the property. "Follow-up observations," he wrote, showed that, during Sunday Mass, "vehicles were parked on grassy areas in violation" of the zoning ordinance. He asked Miles Christi to "describe[] the measurements of the [oratory]" and to provide "an operations plan describing activities" so that the Township could "determine if the present amount of parking is sufficient so vehicles do not park on grassy areas." Bauer attached a copy of the township's parking ordinance, which provides:

> When building alterations . . . are to be made, or use or activity is contemplated that may produce parking demand in excess of available spaces, the Township shall require a sketch plan and other written documentation of the change or a parking study to document adequate parking is provided or will be expanded to meet anticipated needs.

Northville Code of Ordinances ("Northville Code") § 170-26.1(F). App. 4a-5a.

The Township's ordinances generally require that one- or two-family homes have two parking spaces per dwelling unit. *See id.* § 170-26.2. This requirement addresses the number of parking spaces that must be available—it is not a limit on the number of cars that can be parked at a private dwelling. The Miles Christi house satisfies this requirement. For "[c]hurches, temples or other places of worship," there must be "1 space per 3 seats or 6 feet of pews in the main unit of worship, plus any additional spaces needed for

accessory uses," and the property owners must submit "[a]n operations plan to describe all of the church-related activities . . . to support the amount of parking provided." *Id.* App. 4a-5a.

Father Bertolacci responded by letter on March 1, 2007, describing the activities conducted at the home and the eighteen-person oratory. "In order to reduce any parking on the grass," he added, Miles Christi was "willing to expand [their] driveway if needed." Father Bertolacci "question[ed] the validity of the complaints," but assured Bauer that Miles Christi wanted to do its best both to serve the community and to live responsibly within it. App. 5a.

On March 23, 2007, Father Cesar and Brother Francisco met with Snider, Frey, and Bauer to discuss the complaints. During this meeting, Frey confirmed her decision that the Miles Christi house was no longer a private residence but a church under the Township's zoning ordinance, to which Father Cesar objected. Respondents also warned Petitioners that if they wanted to maintain their property as a private residence they had to limit the number of vehicles that parked there to "six to eight," threatening to issue tickets if there were more. *See* App. 5a-6a, 52a.

At the conclusion of this meeting, Frey directed Father Cesar and Brother Francisco to contact Bauer within 30 days to inform him as to how they wished to proceed, warning Father Cesar and Brother Francisco that they "wouldn't want Joe Bauer to come buy (sic) in 30 or 90 days and write you a ticket." *See* App. 52a.

As a result of this meeting, Petitioners hired a professional planning firm to help them with the

Township's demands since the matter required professional assistance. Petitioners incurred over $5,000 in expenses as a result. Pursuant to Frey's direction, Father Cesar promptly contacted Bauer and told him that they had hired a professional planner. App. 20a, 52a.

Despite Petitioners' desire to resolve the zoning issues with the Township, on June 5, 2007, Bauer, at the direction of Frey, issued a citation to Miles Christi for failing "to submit site plan application" under Article 33 of the Township's zoning ordinance. The citation was issued to Petitioners even though a "single-family home" is "exempt from site plan review" under the ordinance. *See* App. 12a. According to Respondents, "The civil infraction ticket commenced legal proceedings to enforce the Township's site plan review procedures based on the conclusion that, under § 170.33.2, Miles Christi had changed the use of the Property from a mere residence to a more intensive non-residential use resembling a small church or place of worship." App. 53a.

According to Frey and Bauer, who were testifying on behalf of the Township pursuant to Fed. R. Civ. P. 30(b)(6), Respondents' individualized, subjective determination that Petitioners were required to submit a full site plan for review and approval was based on two activities occurring at the residence: (1) the celebration of Mass in the oratory and (2) the holding of Catholic formation/Bible study groups. And the only way for Petitioners to avoid having to submit to the costly zoning approval process was for Petitioners to "eliminate" these religious activities.

Respondents imposed this requirement on Petitioners even though the only limitation that the Township's zoning ordinance places on the parking of passenger vehicles at a private residence is that they park on an improved surface, such as asphalt, which is how the vehicles are able to be parked at the Miles Christi house. There is no limit on the number permitted. And there is no limit imposed by the Township's zoning ordinance on the number of people who can visit a private residence for social gatherings or other similar events such as poker nights or football parties. *See* App. 14a. The large driveway at the Miles Christi house can presently accommodate the Petitioners' parking needs as a private residence, including the parking associated with Petitioners' religious activities.

Based on a conservative estimate, it will cost Petitioners approximately $30,000 to simply prepare and submit the required site plan application to the Township. This includes the Township's $5,000 application fee. However, these costs do not include the renovation costs to convert the house to a church, which could easily exceed $80,000. Moreover, seeking a variance with the ZBA will cost Petitioners approximately $6,200. And whether Petitioners will be permitted to engage in their religious activities without incurring additional costs is based on Respondents' subjective determinations. *See* App. 20a, 52a.

If Petitioners do not submit the required site plan application, they face civil fines for each day that they are not in compliance. App. 33a.

F. Immediate Harm to Miles Christi.

Respondents' actions, which include credible threats to issue civil infraction tickets, warnings to limit the number of vehicles parked at Petitioners' home, the recording of license plate information of those who visit the home, overt and covert surveillance of Petitioners' home and activities, and the actual issuing of a civil infraction citation to Petitioners because of their private religious activities, have deterred Petitioners' use and enjoyment of their home. Respondents' actions have changed what Petitioners are able to do at their home and limited the people they would like to invite for religious reasons. Petitioners feel like everything they do in their private home is being watched and monitored. As a direct result of Respondents' actions, Petitioners permanently canceled a Catholic formation/Bible study group at the Miles Christi house, and they continue to limit visits of guests they would like to invite to their home for religious purposes. Petitioners have also incurred over $5,000 in costs. App. 27a, 32a-33a.

G. Legal Proceedings.

On September 21, 2007, Petitioners filed this action in federal court. They challenged the legality of the Township's zoning ordinances as applied to the Miles Christi house and the conduct of Township officials in enforcing the ordinances, invoking the free exercise and free speech protections of the First and Fourteenth Amendments, the Religious Land Use and Institutionalized Persons Act (RLUIPA), and the Michigan Constitution. They sought declaratory and injunctive relief, money damages, and attorney's fees. App. 6a-7a.

The state court stayed the civil infraction enforcement proceeding pending the outcome of this federal action. Respondents moved to dismiss the federal case, arguing that Miles Christi had not received a "final decision" about the application of the Township's zoning ordinances to their property, making the religious order's claims unripe. The district court agreed and dismissed the complaint without prejudice, reasoning that the Township's final decision concerning the application of the zoning ordinances is still "unknown" because Miles Christi has not appealed the demand for a site plan to the zoning board. Miles Christi appealed the district court's decision to the Sixth Circuit, which affirmed 2 to 1. App. 7a.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO ESTABLISH THE APPROPRIATE "RIPENESS" TEST FOR FIRST AMENDMENT CLAIMS ARISING IN THE LAND USE CONTEXT.

Review of the majority opinion is necessary to provide needed clarity to the federal courts on the applicable "ripeness" test for First Amendment claims arising in the land use context.[2] For example, as demonstrated further in this petition and by Chief

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[2] In its decision below, the district court claimed that "the Sixth Circuit clearly indicated a shift in jurisprudence governing the review of state zoning actions." App. 62a. This perceived "shift in jurisprudence" is failing to account for, and thus failing to protect, First Amendment rights. Unfortunately, the majority opinion reinforces this perception and adds further precedent to support it.

Judge Batchelder's dissenting opinion, the Sixth Circuit and the Second Circuit differ fundamentally on the approach to take and the test to employ when resolving such cases.

By affirming the dismissal of the complaint on ripeness grounds, the majority is forcing Petitioners into a Hobson's choice: (1) either subject their right to engage in constitutionally protected activity to an arbitrary, burdensome, and costly process that is being applied in a manner that violates their constitutional rights, or (2) surrender those rights. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding challenge ripe where respondents were "faced with a Hobson's choice" of compliance with the law or penalty).

The majority incorrectly claimed that Petitioners' "Hobson's choice" is "a false dichotomy," stating that "[t]here is a third option—going to the zoning board." App. 13a. As noted further below, this "third option" does not remedy the constitutional harms nor deprive a federal court of its jurisdiction to hear and decide this case.

If a governmental entity is enforcing its zoning ordinance (or any other ordinance or regulation for that matter) in a manner that restricts expressive activity protected by the First Amendment, as in this case, that fact is a sufficient basis for a federal court to exercise its jurisdiction to hear the case. Requiring Petitioners to appeal the Township's unlawful enforcement decision to the zoning board—and pay the costs associated with it—effectively conditions the exercise of Petitioners' constitutional rights upon the prior approval of the government.

It should make little difference that the restriction at issue here comes in the form of a zoning regulation. Zoning regulations, like any other form of government restriction, such as a permit requirement or a licensing fee, *see, e.g., Lovell v. Griffin,* 303 U.S. 444 (1938) (holding as unconstitutional a city ordinance requiring a permit to distribute pamphlets); *Schneider v. N.J.*, 308 U.S. 147, 164 (1939) ("To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."), can place unconstitutional restraints and burdens on protected activity, as this case illustrates. To treat a zoning restriction that infringes upon constitutionally protected rights differently from other government restrictions serves to devalue the constitutional rights that are affected. As this Court stated decades ago, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). And that injury, suffered here by Petitioners, is sufficient to ripen their claims.

Unfortunately, the majority opinion failed to take into consideration the important First Amendment rights at stake in this case. As Chief Judge Batchelder accurately observed in her lengthy dissent, "[T]he majority opinion does not adequately account for the First Amendment implications of this case and conflates the exhaustion of administrative remedies

with the obtaining of a final decision." App. 18a. (Batchelder, C.J., dissenting).

Indeed, the Chief Judge's dissenting opinion not only provides support for granting this petition, but it provides the blueprint by which this and other similar cases could be decided to ensure that vulnerable First Amendment liberties receive appropriate consideration and protection in the land use context. *See generally NAACP v. Button*, 371 U.S. 415, 433 (1963) (observing that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society," and "[b]ecause [these] freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"); *Newsome*, 888 F.2d at 378 (observing that one reason First Amendment rights are stringently protected is "the intangible nature o[f] the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future") (internal quotations and citation omitted).

As the Chief Judge concluded,

> Because the majority withholds judicial consideration, Miles Christi will have no recourse but to engage in the zoning process it did not initiate and argues was unlawfully required, and which cannot provide a complete remedy, or to cease or scale back its religious activities in the hope of avoiding future problems. Even the latter approach, however, will not prevent Miles Christi from being fined in the already progressing court suit.

> Accordingly, [the court should] hold that Miles Christi's claims are ripe, and that the district court erred in dismissing them.

App. 44a.

II. APPLYING THE PRUDENTIAL "FINALITY REQUIREMENT" TO FIRST AMENDMENT CLAIMS ARISING IN THE LAND USE CONTEXT WITHOUT CONDUCTING A "THRESHOLD" INQUIRY AS TO WHETHER IT SHOULD APPLY DOES NOT ADEQUATELY SAFEGUARD FIRST AMENDMENT LIBERTIES.

The Chief Judge's dissenting opinion rejected the majority's finality determination because it failed to adequately account for Petitioners' First Amendment interests. The Chief Judge argued that the Sixth Circuit should follow the Second Circuit and employ the "threshold test" of *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 350 (2d Cir. 2005), observing that this threshold test "applies to First Amendment claims in the land use context," and noting "that the threshold question is distinct from the finality determination."[3] App. 25a.

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[3] The "finality requirement" was articulated by this Court in *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), a Fifth Amendment takings case in which the Court held that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue."

As the Chief Judge further noted, "[T]he district court, following *Insomnia* [*Inc. v. City of Memphis*, 278 Fed. Appx. 609 (6th Cir. 2008) (unpublished)], did not structure the analysis in the form of a threshold question. Rather, it first decided that there was no final determination, and then analyzed the two-part test from *Insomnia* and *Murphy*. *See* R.50 at 11. My proposed clarification of the test would prevent this improper approach in the future." App. 26a, n.1.

According to the Chief Judge, the reviewing court should

> consider on review whether *Williamson County*'s prudential finality requirement applies to Miles Christi's specific First Amendment claims. If it does, we must decide whether Miles Christi has a final decision for purposes of all its claims. If the finality requirement does not apply to the First Amendment claims, then we must consider the finality requirement to determine the ripeness of the remaining claims. If the finality requirement is satisfied, we must still ensure that Miles Christi's claims satisfy Article III ripeness.

App. 24a-26a.

The "finality requirement," which is a prudential rule that may be set aside when appropriate, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 (1993), "should be employed with caution in resolving First Amendment claims," lest vulnerable First Amendment freedoms be lost in the process. App. 24a. Consequently, a "preliminary analysis"—that is, a "threshold test"—should be employed to determine

whether the finality requirement applies to specific First Amendment claims in the first instance. App. 24a.

The "threshold test" suggested by the Chief Judge was set forth by the Second Circuit in *Murphy* as follows: "(1) whether the [plaintiffs] experienced an immediate injury as a result of [the defendants'] actions, and (2) whether requiring the [plaintiffs] to pursue additional administrative remedies would further define their alleged injuries." App. 24a-25a (quoting *Murphy*, 402 F.3d at 350-51). This "relaxed approach" is consistent with *Lucas*, as well as the approach taken by the federal circuit courts in First Amendment cases in general. *See Warshak v. United States*, 532 F.3d 521, 533 (6th Cir. 2008) (noting that "a chilling effect might relax ripeness requirements in a First Amendment case"); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 407 (6th Cir. 1999) ("In the First Amendment arena . . . courts have been willing to relax prudential standing limitations . . . ."); *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002) (same); *Cheffer v. Reno*, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) ("[T]he doctrine of ripeness is more loosely applied in the First Amendment context.").

Whether Petitioners have suffered an "immediate injury" that it would be imprudent to apply the "finality requirement" should be determined by considering well-established constitutional principles which hold that even the momentary loss of First Amendment liberties constitutes irreparable harm. *Elrod*, 427 U.S. at 373; *Newsom*, 888 F.2d at 378; *see also Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as

potently as the actual application of sanctions."); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[A]n actual injury can exist when the plaintiff is chilled from exercising her right to free expression or foregoes expression in order to avoid enforcement consequences."); *Minnesota Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997) ("Sufficient hardship is usually found if the regulation . . . chills protected First Amendment activity.").

In this case, "Miles Christi has alleged sufficient 'immediate harms' that it would be imprudent to apply the finality requirement to its claims." App. 32a. First, "it canceled a Bible study on account of the pretextual police surveillance." App. 32a. Second, Respondents' "threats to ticket cars parked on the grass and the potential for further civil infraction tickets 'chilled' [Petitioners'] religious activities." App. 32a. Third, Petitioners "paid $5,000 for an engineering estimate," and it was Respondents' actions "that necessitated this cost." App. 32a. Finally, Respondents gave Petitioners the "choice" of submitting to their zoning requirements or ceasing their constitutionally protected religious activities. When Petitioners refused to submit, they were issued a ticket, haled into state court, and now face the potential of a civil fine. App. 33a.

Moreover, Petitioners' immediate injuries are due in great measure to the process itself: the arbitrary and subjective application of the Township's zoning ordinance. The zoning ordinance is being used here to empower government officials to force compliance with their demands "on an ad hoc and subjective basis, with

the attendant dangers of arbitrary and discriminatory application." *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Respondents' misuse of this ordinance inevitably forces Petitioners to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 109. Consequently, Petitioners are in the predicament of either complying with a discriminatory application of the Township's zoning ordinance, which is not only burdensome and costly to navigate, but also carries with it civil fines for failing to comply, or "eliminate[ing]" their protected activities so as to "steer far wider of the unlawful zone"—a zone that Respondents have no authority under the Constitution to enforce in the first instance. The restrictions on Petitioners' speech activity—canceling a Bible class, limiting the number of guests, and constantly monitoring the number of people who visit their home, among others—are directly (and for no other reason) caused by Respondents' actions. This harm, which has already occurred, will only worsen by forcing Petitioners to incur the additional costs and burdens associated with submitting an application to the Planning Commission or the ZBA for approval of their activities, particularly when there are no objective criteria for these government officials to rely upon to either approve or disapprove Petitioners' application and no other private citizen in the Township is required to seek such approval for holding social activities in their home. *See Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943) (stating that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution" and "[t]he power to impose a license tax on the exercise of [First Amendment] freedoms is indeed as potent as the

power of censorship which [the] Court has repeatedly struck down").

As summarized by the Chief Judge,

> Because I would hold that Miles Christi has alleged sufficient immediate injuries, I need not address whether requiring Miles Christi to pursue additional administrative remedies would further define its allegations, and I would hold that the finality requirement does not apply to its First Amendment claims.

App. 33a-34a.

III. THE MAJORITY OPINION INCORRECTLY CONFLATES THE EXHAUSTION OF ADMINISTRATIVE REMEDIES WITH THE OBTAINING OF A FINAL DECISION.[4]

The majority opinion conflicts with this Court's precedent because it improperly conflates the exhaustion of administrative remedies, which is not required for civil rights claims, *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963), with obtaining a final decision in the land use context ("finality requirement"). App. 32a, 34a-43a.

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[4] Because the "finality requirement" does not apply to Petitioners' First Amendment claims, as noted *supra*, the arguments in this section apply to Petitioners' remaining equal protection, due process, and RLUIPA claims. Indeed, these arguments further support a "ripeness" finding with regard to the First Amendment claims as well.

As the dissenting opinion notes, "[Respondents] and the majority improperly conflate Frey's intensity determination with the possible end result of the zoning process." App. 38a. The proper focus here is on the intensity determination and its effects. "After analyzing the decision and its effects, we must then examine Miles Christi's available administrative options and determine whether each is part of Northville's process for arriving at 'final decisions,' which would preclude a finding of finality, or whether they are purely 'remedial,' which would not." App. 39a.

The majority's conclusion that Petitioners' claims are not ripe because they have a "third option—going to the zoning board—which may put this entire dispute to rest and which at a minimum makes Miles Christi's choice anything but Hobsonian" is incorrect and improperly conflates exhaustion of remedies with the finality requirement, contrary to this Court's precedent.

In *Williamson County*, this Court explained the difference between exhaustion of administrative remedies, which is not required, and the finality requirement:

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an

> actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson County, 473 U.S. at 192-93 (emphasis added) (citations omitted).

Thus, once an "initial decisionmaker," such as Respondent Frey, who had the authority as the Director of Community Development to make the intensity determination, "has arrived at a definitive position on the issue that inflicts an actual, concrete injury," the finality requirement has been met. Any appeal of this decision to the ZBA or through a state judicial proceeding is merely remedial in nature. Therefore, Petitioners are "not . . . required to resort to those procedures before bringing [their] § 1983 action." *Id.* at 193.

Respondents' intensity determination, which requires Petitioners to either submit a full site plan for review under pain of civil fines or else "eliminate" their religious activities, could be appealed to the ZBA, which would then conduct a hearing. The ZBA could reverse or modify the decision, but "only if it finds that the action or decision appealed meets at least one of the following criteria: (a) [w]as arbitrary or capricious; (b) [w]as based on an erroneous finding of fact; (c) [c]onstituted an abuse of discretion; or (d) [w]as based on [an] erroneous interpretation of this chapter." Northville Code §170-41.4(A)(3) (emphasis added). As the Chief Judge correctly noted in her dissent, "This option is remedial." App. 40a. Therefore, it is not

required. As the Chief Judge further noted, "The majority opinion concludes, with minimal discussion of the local ordinances, that the ZBA is 'empowered to participate in the decisionmaking process from the outset.' A plain reading of the local ordinances and the facts of this case show that conclusion to be clearly wrong." App. 40a, n.7.

Petitioners could also file a request with the Planning Commission for a waiver from, or modification to, the parking and landscaping requirements or seek a variance from these requirements with the ZBA. *See* Northville Code §§ 170-24.13, 170-26.1(K), 170.41.4(A)(5) & (6). "However, none of these options can serve to modify Frey's intensity determination. Instead, they are remedial measures, designed to address only the consequences of Frey's determination. Miles Christi's claim all along, however, has been that the intensity determination, itself, was incorrect. These options, therefore, do not impact the finality of Frey's intensity determination, and Miles Christi did not have to exhaust them." App. 41a.

Petitioners could potentially request permission from the Planning Commission or the ZBA to file a less-demanding site plan under Article 33 of the Northville Code,[5] but this option similarly fails because Petitioners "would still be subject to Frey's decision . . . [and] would still have to participate in a

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[5] Based on the facts of this case, it does not appear that any of the less demanding options under Article 33 would be available to Petitioners. *See* Northville Code § 170-33.2.

process it did not initiate or face the consequences for continuing its activities." App. 41a.

Finally, it must be noted that Petitioners could not file a request for a variance to be free from the site plan requirements because no such variance exists. App. 42a, n.8. And even if such a variance was available to Petitioners, to qualify they would have to show that "the site cannot reasonably be used for any of the uses allowed under current zoning," something they could not do. App. 42a (quoting Northville Code § 170-41.4(B)(6)(b)). Indeed, "[a]pplying for such a variance would be futile, as the ZBA does not have the authority to alter any of the terms of the ordinance." App. 42a.

As the Chief Judge properly concluded:

> Given these available options, I would hold that, while Miles Christi has not exhausted its opportunities for administrative relief, it has obtained a final decision sufficient to ripen its claims. Frey, the initial decisionmaker, was empowered as the Director of Community Development to make the decision she did for Northville. That decision is subject to local appeal, but exhausting appeals is not required under *Williamson County*. Other available actions would not change Frey's decision that Miles Christi's use of the property had become more intensive. Therefore, "the initial decisionmaker has arrived at a definite position on the issue that inflicts an actual, concrete

injury," and Miles Christi has obtained a final decision.

App. 42a.

CONCLUSION

The Court should grant the petition for a writ of certiorari to establish the proper "ripeness" test to apply to First Amendment claims arising in the land use context.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106
Tel: (734) 827-2001
Fax: (734) 930-7160
rmuise@thomasmore.org

Counsel for Petitioners

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-1618

[Filed December 21, 2010]

MILES CHRISTI RELIGIOUS ORDER, CESAR BERTOLACCI, Father, and FRANCISCO CONTE-GRAND, Brother,

Plaintiffs-Appellants,

v.

TOWNSHIP OF NORTHVILLE, CHIP SNIDER, in his official capacity as Northville Township Manager, JENNIFER FREY, in her official capacity as Director of Community Development for Northville Township, JOSEPH BAUER, in his official capacity as Ordinance Enforcement Officer for Northville Township,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 07-14003—Paul D. Borman, District Judge.

Argued: June 10, 2010

Decided and Filed: December 21, 2010

Before: BATCHELDER, Chief Judge;
SUTTON and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Robert Joseph Muise, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, for Appellants. Timothy S. Wilhelm, JOHNSON, ROSATI, LaBARGE, ASELTYNE & FIELD, P.C., Farmington Hills, Michigan, for Appellees. **ON BRIEF:** Robert Joseph Muise, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, for Appellants. Timothy S. Wilhelm, Marcelyn A. Stepanski, JOHNSON, ROSATI, LaBARGE, ASELTYNE & FIELD, P.C., Farmington Hills, Michigan, for Appellees.

SUTTON, J., delivered the opinion of the court, in which KETHLEDGE, J., joined. BATCHELDER, C.J. (pp. 14–33), delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge. A religious order and two of its members filed this action under the Religious Land Use and Institutionalized Persons Act and the

Federal and State Constitutions against the Township of Northville and its officials based on a dispute over the application of several local zoning ordinances to a residence that the order owns in the township. The district court concluded that the suit was unripe, and so do we.

I.

Since 2002, Miles Christi, an international religious order, has owned a five-bedroom house on a one-acre plot of land in a residential neighborhood in Northville, Michigan. Several fathers and brothers of the order, six in all, live there. The fathers conduct private daily masses in a small eighteen-person chapel inside the house for members of the order. Miles Christi also hosts regular Bible studies "for invited friends and their children" with attendance ranging from five (the most common) to fifteen individuals. R.1 ¶ 18. Nothing on the exterior of the house suggests that the residents use it as a church or religious organization.

In March 2003, some Northville citizens wrote letters to township officials about the Miles Christi house, complaining about increased automobile traffic and the number of cars parked there and suggesting that the order was not using the house in compliance with the neighborhood's residential zoning. Northville's Town Planner, Maureen Osiecki, replied to at least one of the letters by saying that "the priests may use this home as their residence" and that the house was "not a church, nor a parish." R.31-10.

The complaints did not stop there. Over the next few years, Joseph Bauer, Northville's Ordinance

Enforcement Officer, continued to receive complaints about the house. On several occasions, he drove by the property and made notes about the zoning issues implicated by the complaints, but he did not take any action.

In December 2006, a neighbor called Bauer to complain about the amount of traffic and the number of parked cars at the house. She believed that the property was being used as an office rather than as a residence. In response to these complaints, Bauer conducted more frequent surveillance of the house. On at least one occasion, he recorded the license plate numbers of the cars parked at the house.

Bauer was not the only one conducting surveillance. The fathers and brothers of Miles Christi took several photographs of an officially marked car driving by their property and recorded the times—several per day—when the car drove by.

On February 7, 2007, Bauer sent a letter to Father Cesar Bertolacci describing his surveillance of the property. "Follow-up observations," he wrote, showed that, during Sunday mass, "vehicles were parked on grassy areas in violation" of the zoning ordinance. R.31-12. He asked Miles Christi to "describe[] the measurements of the [oratory]" and to provide "an operations plan describing activities" so that the township could "determine if the present amount of parking is sufficient so vehicles do not park on grassy areas." *Id.* Bauer attached a copy of the township's parking ordinance, which provides:

> When building alterations . . . are to be made, or use or activity is contemplated that may

> produce parking demand in excess of available spaces, the Township shall require a sketch plan and other written documentation of the change or a parking study to document adequate parking is provided or will be expanded to meet anticipated needs.

Northville Code of Ordinances § 170-26.1(F). The township's ordinances generally require that one- or two-family homes have two parking spaces per dwelling unit. *See id.* § 170-26.2. But for "[c]hurches, temples or other places of worship," there must be "1 space per 3 seats or 6 feet of pews in the main unit of worship, plus any additional spaces needed for accessory uses," and the property owners must submit "[a]n operations plan to describe all of the church-related activities . . . to support the amount of parking provided." *Id.*

Father Bertolacci responded by letter on March 1, 2007, describing the activities conducted at the home and the eighteen-person oratory. "In order to reduce any parking on the grass," he added, Miles Christi was "willing to expand [their] driveway if needed." R.31-12. Father Bertolacci "question[ed] the validity of the complaints" but assured Bauer that Miles Christi wanted to do its best both to serve the community and to live responsibly within it. *Id.*

On March 23, 2007, several residents of the Miles Christi house met with township officials to discuss the parking issue. Joining Bauer on behalf of the township were Chip Snider, Township Manager, and Jennifer Frey, Director of Community Development. Jennifer Frey told the order that the Miles Christi house was operating as "something other than [a]

single family residence" and that "they needed to provide . . . an operations plan to support and justify the amount of parking they [were] provid[ing]." R.31-26 at 55–56. Ultimately, she said, Miles Christi would need to provide parking in the rear of its lot sufficient to meet peak demand, estimated at twenty to twenty-two people. When the residents explained that they could not feasibly locate additional parking in the rear of the lot, the officials told them that they would have to (1) request a variance from the zoning board of appeals to allow parking in the front yard and (2) submit a site plan to the Northville Planning Commission detailing the intended expansion of parking spaces and sufficient landscaping to block the view of parked cars from neighboring properties.

By June 5, 2007, Miles Christi had not submitted a site plan, prompting Bauer to issue a ticket for violating Ordinance § 170-33.3, which governs "[s]ite plan review procedures." The ticket directed Miles Christi to appear in state court on June 20, 2007, which Miles Christi did. *See People v. Miles Christi Religious Order*, No. 07v324326A (Wayne Cnty. Dist. Ct. June 20, 2007). The state-court proceedings developed an extensive record, including depositions of members of Miles Christi and township officials discussing the events leading to the ticket.

On September 21, 2007, Miles Christi, Father Bertolacci and Brother Francisco Conte-Grand filed this action in federal court. They challenged the legality of Northville's zoning ordinances as applied to the Miles Christi house and the conduct of township officials in enforcing the ordinances, invoking the free-exercise protections of the First and Fourteenth Amendments, the Religious Land Use and

Institutionalized Persons Act (RLUIPA) and the Michigan Constitution. They sought declaratory and injunctive relief, money damages and attorney's fees.

The state court stayed the enforcement proceeding pending the outcome of the federal action. The township defendants moved to dismiss the federal case, arguing that Miles Christi has not received a "final decision" about the application of Northville's zoning ordinances to their property, making the religious order's claims unripe. The district court agreed and dismissed the complaint without prejudice, reasoning that the township's final decision concerning the application of the zoning ordinances is still "unknown" because Miles Christi has not appealed the demand for a site plan to the zoning board. Miles Christi appeals.

II.

The ripeness doctrine encompasses "Article III limitations on judicial power" and "prudential reasons" that lead federal courts to "refus[e] to exercise jurisdiction" in certain cases. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). The "judicial Power" extends only to "Cases" and "Controversies," U.S. Const. art. III, § 2, not to "any legal question, wherever and however presented," without regard to its present amenability to judicial resolution. *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc). And the federal courts will not "entangl[e]" themselves "in abstract disagreements" ungrounded in the here and now. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967); *see Warshak*, 532 F.3d at 525. Haste makes waste, and the "premature adjudication" of legal questions compels

courts to resolve matters, even constitutional matters, that may with time be satisfactorily resolved at the local level, *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807; *Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 617 (6th Cir. 2008), and that "may turn out differently in different settings," *Warshak*, 532 F.3d at 525.

To decide whether a dispute has ripened into an action amenable to and appropriate for judicial resolution, we ask two questions: (1) is the dispute "fit" for a court decision in the sense that it arises in "a concrete factual context" and involves "a dispute that is likely to come to pass"? and (2) what are the risks to the claimant if the federal courts stay their hand? *Warshak*, 532 F.3d at 525; *see Abbott Labs.*, 387 U.S. at 149. In the land-use context, the demands of "a concrete factual context" and "a dispute that is likely to come to pass" converge in an insistence on "finality," an insistence that the relevant administrative agency resolve the appropriate application of the zoning ordinance to the property in dispute. In the related context of takings claims under the Fifth and Fourteenth Amendments, courts likewise insist that a claimant "obtain[] a final decision regarding the application of the zoning ordinance[s] . . . to its property," *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), a requirement rooted in ripeness considerations, *see id.* at 186–94; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012–13 (1992). In addition to takings claims, we have applied the finality requirement to other constitutional and statutory challenges to local land-use requirements. *See Grace Cmty. Church*, 544 F.3d at 615 (RLUIPA); *Insomnia Inc. v. City of Memphis*, 278 F. App'x 609, 613 (6th Cir. 2008) (Free Speech Clause); *Bannum, Inc. v. City of*

Louisville, 958 F.2d 1354, 1362 (6th Cir. 1992) (Equal Protection Clause).

Miles Christi has not satisfied either requirement for bringing this claim now. It has not shown that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty.*, 473 U.S. at 186; *Grace Cmty. Church*, 544 F.3d at 615. And it has not shown that it will suffer any hardship by delaying a federal court decision until the zoning board acts.

No final decision. Miles Christi concedes that it has not gone to the zoning board to determine whether the ordinances require it to submit a site plan and, if so, which regulations impose this obligation and why. And it does not deny that the administrative process permits residents to seek a variance. What the religious order says instead is that Jennifer Frey's request that Miles Christi provide a site plan, based on a determination that the home was being used in a more intensive way than residential zoning permits, amounts to the kind of final decision necessary to overcome these ripeness concerns.

This position, however, does not square with the relevant regulations. At the time the complaint was filed, the Northville Code provided that "[t]he Zoning Board of Appeals shall be responsible for interpretations to the text of [the zoning ordinances]" and shall be responsible for "interpret[ing] the provisions or meaning of standards of [the ordinances]." § 170-41.4(D) (2007); R.31-39 at 8. In the context of site plan review, the Code provided that "[t]he application may be tabled if it is determined . . .

[that] an ordinance interpretation or variance is needed from the zoning board of appeals." § 170-33.3(G)(1)(2007); R.31-38 at 7. Today's regulations are to the same effect, providing that "prior to initiati[on] of site plan review," a property owner should appeal to the zoning board "[i]f an ordinance interpretation or variance is needed." § 170-33.3(B)(1) (2010). An administrative appeal to the zoning board thus will resolve at least three questions, all of which lie within the zoning board's plenary interpretive jurisdiction, about Miles Christi's obligations or indeed whether it has any obligations at all: (1) Has Miles Christi put its house to a "more intensive use" within the meaning of § 170-33.2 of the Northville Code? (2) Is the Miles Christi house a "church" within the meaning of § 170-26.2 of the Code? and (3) Does Miles Christi have an obligation to submit a site plan in the first instance in view of the meaning of these ordinances and its request for a variance? Finality requires the input of the zoning board on these unresolved questions.

No hardship to Miles Christi. An appeal to the zoning board not only will ground this dispute in a concrete legal setting—by permitting the zoning board to clarify the township's application of its land-use laws to this property—but it also may help Miles Christi. The zoning board may grant a variance to the religious order, or it may provide a different intensive-use determination. Both forms of relief will considerably narrow the grounds of dispute between the parties if not end the dispute altogether. Far from imposing a hardship on Miles Christi, an appeal to the zoning board may give the order the very relief it seeks: the chance to live and serve the Northville community without further inquiries, or for that

matter harassment, from the neighbors and township officials.

We have been down this road before. In *Grace Community Church*, a township issued a special use permit to a church, and one month later the township revoked the permit after a neighbor complained that the church was not complying with the conditions of the permit. 544 F.3d at 615–16. The church filed a federal action challenging the revocation under RLUIPA and the Equal Protection Clause rather than appealing the revocation to the zoning board. *Id.* at 611. In dismissing the claims on ripeness grounds, we noted that the church had made "no effort to resolve the dispute locally": It did not attempt "to complete the factual record, to more fully explain its position to the Commission, to seek reconsideration, or to appeal the revocation decision" to the zoning board. *Id.* at 616. What was true there is just as true here.

Unlike *Grace Community Church*, Miles Christi responds, a voluminous record makes its and the Township's positions "well defined." Miles Christi Br. 44. But the existence of an extensive record—Miles Christi's response to the township's summary judgment motion, including exhibits, comprises over 750 pages—is not the same as "a concrete factual context," which is what matters. *Warshak*, 532 F.3d at 525. Indeed, in *Warshak*, a case also dismissed on ripeness grounds, the record included numerous exhibits relating to government officials' past conduct, *see Warshak v. United States*, No. 06-cv-00357 (S.D. Ohio June 12, 2006), but nothing that shed light on the material question of what government officials would do in the future, *see Warshak*, 532 F.3d at 526–27.

Nor do the parties' summary judgment attachments, including photographs, letters, deposition transcripts and other documents, make up for the same omission that doomed an early federal resolution of the dispute in *Grace Community Church*: a definitive statement from the zoning board, the entity charged with interpreting Northville's zoning ordinances, about which ordinances apply to Miles Christi and about whether Miles Christi must submit a site plan under the ordinances. As things now stand, "we have no idea," *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163 (1967), whether the township's position, as determined by the zoning board, *see* § 170-41.4(D) (2007); § 170-33.3(G)(1) (2007); § 170-33.3(B)(1) (2010), is (1) that Miles Christi must submit a site plan because there has been a "change in the use of land . . . to a more intensive use, in terms of parking," § 170-33.2, (2) that Miles Christi must submit a site plan because its property is a "[c]hurch[], temple[] or other place[] of worship," § 170- 26.2, or (3) that the property is a "single-family home on an individual lot" and therefore "exempt from site plan review," § 170-33.2(A). We might have a sense of what a few township officials think but, by filing this lawsuit when it did, Miles Christi pretermitted the opportunity to submit this issue to the body given decision-making authority over it. How can we know whether the township "has gone too far," as Miles Christi claims, until we "know[] how far the regulation goes," *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 348 (1986), and indeed which regulations apply?

Even aside from these concerns, we cannot say as Miles Christi does that the Township's position is "well defined." During the state court proceedings, Frey

testified that she did not know under which ordinance Bauer was going to issue a ticket, only that it would be a ticket for "[v]iolations of the zoning ordinance." R.31-26 at 62. She also testified that she had not classified the Miles Christi house as a church but had simply determined that it was "something other than a single family residential" home. *Id.* at 54–55. Yet, according to the complaint, which we must take as true at this stage of the case, Frey previously told Miles Christi that it was a "small church" under the zoning ordinances and as a result would have to provide additional parking. R.1 ¶ 41. The Township's back-and-forth positions may well bolster Miles Christi's efforts to establish the bona fides of its claims on the merits, but they undermine any notion that the Township's position is sufficiently "well defined" to ripen this dispute into a matter appropriate for judicial resolution.

Miles Christi protests that, as a matter of hardship, the township put it to a "Hobson's choice" of incurring "the costs and burdens associated with submitting" a site plan on the one hand or continuing constitutionally protected activities on the other. Miles Christi Br. 31–32, 51. But that is a false dichotomy. There is a third option—going to the zoning board—which may put this entire dispute to rest and which at a minimum makes Miles Christi's choice anything but Hobsonian. The zoning board may determine, as a matter of interpretation, that the Northville Code does not require it to submit a site plan. Or it may determine, as a matter of discretion, administrative grace if you will, that Miles Christi should get a variance. Either way, Miles Christi will be able to continue its current use of the house without incurring additional costs or burdens.

Miles Christi adds that the township's actions have had a "chilling effect" on its constitutionally and statutorily protected activities: Threatening to ticket vehicles parked on the lawn, conducting surveillance of the religious order, recording license plates and issuing a ticket for a zoning violation all have "limit[ed]" the order's "religious activities." Miles Christi Br. 51–52. It is true that the existence of a constitutional claim, particularly a First Amendment claim, affects the hardship component of the ripeness inquiry. *See Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002). And it may be true that Northville thus far appears to have an undeveloped sense for the concept of religious liberty, as illustrated by this statement at oral argument: "[F]ootball parties and tailgate parties" do not change "the residential nature of the use; whereas, what they're doing here, they're doing religious education and they're worshipping." Not just the Framers of the Constitution but Congress itself has distinguished between the protections afforded these distinct activities: While the United States Code contains a Religious Freedom and Restoration Act and a Religious Land Use and Institutionalized Persons Act, one will search in vain for a Freedom to Watch Football on a Sunday Afternoon Act.

But a claim does not become ripe at the first whiff of governmental insensitivity or whenever a government official takes an adverse legal position against someone, even if one potential response is to curtail protected activities. One justification for the ripeness doctrine is that it avoids the premature resolution of constitutional questions, including First Amendment questions. *Warshak*, 532 F.3d at 525; *Grace Cmty. Church*, 544 F.3d at 615. And "the existence of a 'chilling effect,' even in the area of First

Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger v. Harris*, 401 U.S. 37, 51 (1971). The answer instead is to look at each case to determine the consequences of staying our hand. That does not pose a problem here, as Miles Christi may potentially resolve the issue (at less expense) by appealing to the zoning board, *see* Northville Ordinance § 170-41.4(D) (2007); § 170-33.3(G)(1) (2007); § 170-33.3(B)(1) (2010), a route that does not require Miles Christi to cancel any Bible studies, masses or other religious activities and a route that does not require it to pay for an engineering study *in the event* the township rejects its interpretation of the ordinances or fails to give it a variance.

But *Williamson County*, Miles Christi protests, says that claimants need not "seek review of an adverse decision and obtain a remedy" in a state forum or otherwise "exhaust" its claims in the state courts, 473 U.S. at 193, and that effectively is what the district court made it do. Yet the Northville Code provides that, when "an ordinance interpretation or variance is needed," a property owner should go to the zoning board during or before the site plan review process, not after. § 170-33.3(G)(1) (2007); § 170-33.3(B)(1) (2010). Rather than merely "review[ing]" the "initial decision[]" of township officials made during the site plan review procedures, the zoning board is "empowered . . . to participate in the . . . decisionmaking" process from the outset, and it is only through that process that the township can provide what *Williamson County* demands: "a definitive position on the issue." 473 U.S. at 193. Because Miles Christi's claims turn on the meaning of the ordinances, they will not ripen until the zoning board weighs in, a

precondition that goes to finality, not to exhaustion of other remedies.

The finality rule, we acknowledge, is a "prudential requirement[]," and we need not follow it when its application "would not accord with sound process." *Lucas*, 505 U.S. at 1012. But for the reasons given, we fail to see why this prudential requirement should be ignored here. *Both* parties, to say nothing of the federal courts, may benefit from the zoning board's input, and the claimant, Miles Christi, faces no jeopardy in the interim, in view of the suspension of the state-law ticketing proceeding.

Murphy v. New Milford Zoning Commission, 402 F.3d 342 (2d Cir. 2005), does not alter this conclusion but indeed bolsters it. The *Murphy* claimants hosted weekly prayer meetings in their home. *Id.* at 345. After several complaints from neighbors, the town informed the Murphys that the zoning laws barred them "from hosting regularly scheduled meetings exceeding twenty-five non-family members." *Id.* at 344. The town eventually issued a cease and desist order, and the Murphys filed a lawsuit in federal court rather than appealing to the zoning board. *Id.* at 345. The Second Circuit concluded that the Murphys' claims, even those under the First Amendment and RLUIPA, were unripe. *Id.* at 354. In reaching this conclusion, the court noted, as we have noted, that "the ripeness doctrine is somewhat relaxed" in First Amendment cases. *Id.* at 351. The court distilled from its prior (Second Circuit) cases a two-part "preliminary inquiry": First, have the plaintiffs "experienced an immediate injury" as a result of the town's actions? And second, would compliance with the finality requirement serve to "further define their alleged

injuries?" *Id.* After considering these questions, *Murphy* concluded that there was no reason to set aside the finality requirement. Just as the cease and desist order in *Murphy* did not give rise to an immediate injury worthy of immediate judicial intervention, *see id.*, so also here.

There is, to be sure, one difference between the Murphys' case and today's case: Northville issued a ticket to Miles Christi, while the town did not do the same to the Murphys. Yet it is not clear which way the existence of this state court enforcement action cuts. In the criminal context, a pending state court action concerning the same issues implicated by a federal civil action *requires* the federal courts to abstain from resolving the civil action until the state courts have acted. *Younger*, 401 U.S. at 40–41. And the *Younger* abstention doctrine applies to at least some types of state court administrative enforcement actions. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975); *cf. Executive Arts Studio, Inc. v. City of Grand Rapids*, 391 F.3d 783, 791 (6th Cir. 2004). But we need not resolve this point today because this feature of *Murphy* makes no difference for a separate reason: Northville's ordinances expressly provide that "[a]n appeal [to the zoning board] shall stay all proceedings in furtherance of the action appealed . . . ." § 170-41.2(B)(3). Under the local law, any potentially coercive effect caused by a ticket can be stopped in its tracks by the modest step of appealing to the zoning board. The same was true in *Murphy*. At the same time that the court acknowledged that town officials did not have "any arresting or fining power," it noted that an appeal to the zoning board would stay any enforcement proceedings. 402 F.3d at 351. Northville's issuance of a ticket, subsequently stayed by operation of law, does

not require the federal courts to resolve Miles Christi's action now.

III.

For these reasons, we affirm.

DISSENT

ALICE M. BATCHELDER, Chief Judge, dissenting. Because I believe that the majority opinion does not adequately account for the First Amendment implications of this case and conflates the exhaustion of administrative remedies with the obtaining of a final decision, I respectfully dissent.

This case revolves around Jennifer Frey's intensity determination, not, as Northville frames it, the possible end result of the larger zoning process. The two are in fact distinct, and Miles Christi's claims arise from Frey's decision. Miles Christi was thrust into the current controversy, not because of any actions it initiated, but solely because of actions initiated by state officials. Frey, acting pursuant to her authority as Director of Community Development, determined that Miles Christi had intensified the use of its property; yet Miles Christi was merely using its property exactly as it always had. Frey's decision immediately harmed Miles Christi's First Amendment rights, and that harm cannot be undone by any retrospective relief that Miles Christi might obtain from the Zoning Board of Appeals ("ZBA").

Because Miles Christi suffered a First Amendment harm, this case is not a run-of- the-mill takings clause case. Takings clause cases, though applicable, cannot fully address the issues presented here because the First Amendment triggers concerns unaccounted for by the traditional takings clause analysis.

Further, any relief that the ZBA may ultimately provide does not impact the finality of Frey's intensity determination. The line between exhausting administrative remedies and obtaining a final decision is often obscure, but the two concepts are distinct. Everything that happened to Miles Christi is a result of Frey's decision. That decision was final and had an immediate, harmful effect. Any relief that the ZBA may provide is merely an administrative remedy, and its availability has no bearing on the finality of Frey's intensity determination.

I.

A review of the record below clearly demonstrates that it was Frey's decision that placed Miles Christi in its current position. Miles Christi is an international Catholic religious order. Since 2002, this particular community has resided in a single-family home in Northville. Also since 2002, Miles Christi has continuously used its home for private daily masses and Bible studies. From 2002 until the events in 2007 giving rise to this litigation, Miles Christi's use of its property remained unchanged.

As the majority opinion indicates, Fr. Bertolacci met with various township officials in March 2007 to discuss the parking problem. At the meeting, Frey stated that she had determined that Miles Christi's

use of the property had become more intensive—that the use had changed from that of a single family residence to a more intensive non-residential use. She explained that the use now resembled a small church or place of worship. Accordingly, she insisted that Miles Christi would have to go through the town's site review process, beginning by submitting a site plan, to ensure there were sufficient parking and landscaping buffers, along with other requirements. *See* Northville Code of Ordinances §§ 170-26.2, 170-26.3. Fr. Bertolacci protested this decision.

Miles Christi hired an engineering firm to estimate the cost of compliance with the ordinances. That review cost about $5,000. The firm estimated the compliance cost at around $80,000, along with the cost of completing and submitting the site plan itself, which could cost an additional $30,000.

Miles Christi did not submit the site plan on the required date, and Bauer issued a civil infraction ticket to the Order on June 5, 2007. Issuance of the ticket commenced legal proceedings in state court to enforce Northville's requirement that Miles Christi submit a site plan. The ticket required Miles Christi to appear in state district court on June 20, 2007, and carried the potential penalty of a sizable fine.

Miles Christi did not pursue any administrative appeals with the Zoning Board of Appeals ("ZBA") or seek a variance, but instead challenged the ticket in the state court proceeding that Northville had initiated. The Michigan district court dismissed the case, ruling that the regulation was overly vague and subjective because it contained no standard by which to judge what constituted a "more intensive use" of the

property. Northville appealed, and the state circuit court reversed and remanded. On remand, the parties agreed to hold the case in abeyance pending the results of this federal litigation.

Miles Christi claims that as a result of the ticket and the threat of future enforcement—including a threat to ticket attendant vehicles if there were too many or if any were parked on the grass—it has refrained from asking friends to join it for religious or other social activities. The Order has continued to celebrate Mass in the oratory and does have on its website a notice for continuing Bible studies and religious activities.

Plaintiffs filed this suit on September 21, 2007, in federal district court raising claims under 42 U.S.C. § 1983 for violation of their First Amendment free exercise, free speech, and association rights, as well as their Fourteenth Amendment rights to due process and equal protection. Plaintiffs also claimed violations of RLUIPA and the Michigan Constitution. Northville filed a motion to dismiss the suit for lack of subject matter jurisdiction under Federal Rules of Civil Procedure rule 12(b)(1), which the district court granted without prejudice on April 30, 2008. The district court held that the claims were unripe because Miles Christi had not obtained a final decision from the local land-use authority. Miles Christi brought this timely appeal, focusing on Frey's intensity determination.

II.

We review an order to dismiss for lack of subject matter jurisdiction *de novo*. *Wagenknecht v. United States*, 533 F.3d 412, 415 (6th Cir. 2008).

A. Ripeness Requirements

Ripeness is a justiciability doctrine arising from both Article III limitations on federal judicial authority and prudential concerns. *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003). Its purpose is "'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Id.* at 807 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

Courts generally consider three factors to determine if a claim is ripe: (1) "the likelihood that the harm alleged by [the] plaintiffs will ever come to pass"; (2) "whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims"; and (3) "the hardship to the parties if judicial relief is denied at this stage in the proceedings." *Adult Video Ass'n v. U.S. Dep't of Justice*, 71 F.3d 563, 568 (6th Cir. 1995) (internal alterations, quotation marks and citations omitted). The test has also been articulated as "two basic questions: (1) is the claim fit for judicial decision in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? and (2) what is the hardship to the parties of withholding court consideration?" *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc) (internal alterations, quotation marks, and citation omitted).

The United States Supreme Court has articulated an additional "finality" requirement for ripeness in the land-use context. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). In *Williamson County*, a Fifth Amendment takings case, the Court held that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.*; *see also MacDonald, Sommer & Frates v. Cnty. of Yolo*, 477 U.S. 340, 348 (1986) (holding that an "essential prerequisite" to the assertion of a takings claim "is a final and authoritative determination of the type and intensity of development legally permitted on the subject property"). Whether the decision of the appropriate governmental entity is "final" for these purposes is not dependent upon the takings claimant's having exhausted futile or remedial appeals; what matters is that the governmental entity has been given the opportunity to apply the local regulations to the particular piece of land in question, including resolving any available variances. *Id.* at 190, 193; *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736–37, 739 (1997) (noting that "*Hodel* thus held that where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim," but not requiring such requests where no discretion was permitted by regulations (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981))); *MacDonald*, 477 U.S. at 348 ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."). This requirement conforms with the high degree of

flexibility and discretion possessed by most land-use boards and the singular nature of each particular parcel of land to which a regulation may be applied. *Suitum*, 520 U.S. at 738–39.

The finality requirement is a prudential rule, and may be set aside if, under the circumstances, it does "not accord with sound process" or it would be imprudent to apply it. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 (1992); *Guggenheim v. City of Goleta*, 582 F.3d 996, 1008 (9th Cir. 2009) ("[T]he Court has explicitly held that the *Williamson* requirements are prudential requirements.").

We have previously cited with approval to a threshold test used by the Second Circuit when determining whether to apply *Williamson County*'s prudential finality requirement to First Amendment claims in the land-use context. *Insomnia Inc. v. City of Memphis*, 278 F. App'x 609, 614 (6th Cir. 2008) (unpublished) (citing *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 350 (2d Cir. 2005) and *Doughtery v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002)). The Second Circuit held in *Murphy* that *Williamson County*'s finality requirement should be employed with caution in resolving First Amendment claims, and therefore undertook "a preliminary analysis" to determine whether it applied. *Murphy*, 402 F.3d at 350–51; *see Doughtery*, 282 F.3d at 90 (2d Cir. 2002) ("[I]n the First Amendment context, the ripeness doctrine is somewhat relaxed."). Whether it applies in a specific case is a fact-specific threshold question. *Murphy*, 402 F.3d at 350. To that end, the court asked "(1) whether the [plaintiffs] experienced an immediate injury as a result of [the defendant's] actions, and (2) whether

requiring the [plaintiffs] to pursue additional administrative remedies would further define their alleged injuries." *Id.* at 351. This relaxed approach is consistent with *Lucas*, as well as our approach in other First Amendment cases. *See Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 406 (6th Cir. 1999) ("In the First Amendment arena . . . especially when there is a possibility that, rather than risk punishment for his conduct in challenging the statute, [an individual] will refrain from engaging further in the protected activity, courts have been willing to relax prudential standing limitations . . . ." (alterations in original)).

In *Insomnia*, we noted that the Second Circuit had "declined to apply the finality requirement in a limited set of First Amendment challenges to land use disputes," and we purported to rely on *Murphy*'s threshold test, finding its factors to be satisfied. *Insomnia*, 278 F. App'x at 614, 615–16. We did not, however, go on to apply *Williamson County*'s analysis to determine if there was a final decision. Instead, we seemed to rely on the threshold analysis to answer that question. *See id.* at 616 ("Taken together, [*Murphy*'s] two prongs indicate that the district court acted properly in dismissing Plaintiffs claim as premature."). *Insomnia* is an unpublished decision, and is not binding precedent. In order to clarify the analysis, I would hold that *Murphy*'s threshold test applies to First Amendment claims in the land use context, and that the threshold question is distinct from the finality determination.

I therefore would consider on review whether *Williamson County*'s prudential finality requirement applies to Miles Christi's specific First Amendment

claims. If it does, we must decide whether Miles Christi has a final decision for purposes of all its claims. If the finality requirement does not apply to the First Amendment claims, then we must consider the finality requirement to determine the ripeness of the remaining claims. If the finality requirement is satisfied, we must still ensure that Miles Christi's claims satisfy Article III ripeness. *See Lucas*, 505 U.S. at 1013; *Suitum*, 520 U.S. at 742–44 (addressing general ripeness concerns after holding that a final decision had been made for purposes of *Williamson County*). I address the immediate-harm prong of the threshold test first.

B. *Murphy*'s Threshold Test—Immediate Harm

The district court found that Miles Christi did not suffer an immediate harm from Northville's decision.[1] It found that Miles Christi's decision to cancel the Bible study and limit visitors was voluntary because Northville did not issue a cease-and-desist order. "Defendants did not require, or even suggest[,] that Plaintiffs limit the number of guests to the property." R.50 at 11. It found further support from the fact that Miles Christi's decision to limit visitors could not cure the reason for the infraction ticket, which was a failure to submit a site plan, and from the fact that the religious activities are currently on-going on the

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[1] I note that the district court, following *Insomnia*, did not structure the analysis in the form of a threshold question. Rather, it first decided that there was no final determination, and then analyzed the two-part test from *Insomnia* and *Murphy*. See R.50 at 11. My proposed clarification of the test would prevent this improper approach in the future.

property. It did not specifically consider any other harms.

Miles Christi argues that it did suffer immediate harms from Northville's decision, including: suppression of speech in the cancellation of a Bible study due to police surveillance; the "chilling" of speech and religious activities due to the threat of vehicle tickets or zoning citations; having to pay $5000 for an unnecessary engineering study; being put to the choice of either paying for an expensive site plan or curtailing or eliminating the Order's religious activities because of Frey's intensity decision; and being ticketed, haled into state court, and potentially subjected to a substantial civil fine. Miles Christi stresses the First Amendment injuries, arguing that "even a momentary loss of First Amendment rights constitutes irreparable harm." Appellant Br. at 50 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The Order contends that Northville's expressed reasons are pretextual, and that the town's actions have been motivated by discriminatory animus towards their religious activities, or a desire to placate the Order's unhappy neighbors by forcing the Order to reduce its activities, or both. Miles Christi also claims the harms are accentuated by vague regulations' being arbitrarily and subjectively applied to chill its protected activities. Miles Christi strongly disagrees with the district court's finding that Northville did not require it to limit its guests or religious activities, arguing that limiting visitors was necessary to cure the "more intensive use" finding by Northville in order to prevent further claims of infraction.

Northville argues that requiring the site plan does not inflict a harm, but is merely a necessary

procedural step towards obtaining a final decision; and that the civil infraction ticket is not a harm, because the proceedings have been stayed. Northville claims that the ticket can still be appealed to the ZBA, although at oral argument it contended that even *that* step would not result in a final decision because the local authority would still have to determine exactly what Miles Christi would have to do to conform its property to local ordinances. The town points out that Miles Christi has not yet been subjected to any fines or criminal sanctions, and claims that Miles Christi would not need to eliminate its religious activities, but merely needs to resolve the parking problem associated with the activities. Finally, Northville disagrees that its activities chilled Miles Christi's speech.

I note, as a preliminary matter, that the Supreme Court has declined to apply the finality requirement where further administrative avenues are available, if pursuit of those avenues could not result in a remedy for past deprivation. *Lucas*, 505 U.S. at 1012. In *Lucas*, a landowner sued the state for an unconstitutional taking when a new law made development of his coastal property illegal. When the landowner filed his case, no administrative avenues were available, but the state legislature changed the law while his case was before the South Carolina Supreme Court, providing an avenue whereby a state administrative body could issue special permits for construction in the otherwise off-limits zone. *Id.* at 1011–12. Despite the state's argument that, given the new administrative avenues for relief, the landowner had not received a final decision, the South Carolina Supreme Court decided the case on the merits. *Id.* at 1011. On appeal to the United States Supreme Court, the state argued

that the landowner's claim was unripe under *Williamson County* because he had not applied for the special permit. The Court disagreed, holding that the finality requirement did not apply to the plaintiff's claims because the special permits were available to allow *future* use of the landowner's property and, even if granted, an application for special permits could do nothing to alter the fact that he had already suffered an undeniable deprivation of the use of his property. *Id.*

In *Murphy*, the Second Circuit applied the finality requirement, holding that a cease-and-desist letter, alone, was not sufficient to constitute an injury. The plaintiffs held large Christian prayer meetings in their home, hosting between 10 and 60 persons weekly. *Murphy*, 402 F.3d at 345. After the neighbors complained about the traffic, number of cars, and noise from these gatherings, the town investigated and then sent an informal letter to the plaintiffs, advising them that the large prayer meetings were not a "customary accessory use in a single-family residential area." *Id.* Two days later the plaintiffs sued in federal district court. The town later sent a formal cease-and-desist letter, which the plaintiffs incorporated into their amended complaint. The plaintiffs did not appeal the cease-and-desist order or request a variance. The district court found for the plaintiffs and issued an injunction against enforcement of the regulations. The Second Circuit reversed. First, it held that the cease-and-desist order did not subject the plaintiffs to an immediate injury. The town did not have the power to enforce the letter by arrests or fines without taking the additional step of bringing an action in state court, so there was no threat of immediate harm. *Id.* at 351. Also, an appeal of the order to the zoning board would

have yielded an automatic stay of enforcement.[2] Next, the court held that the record was insufficiently developed, and that further administrative actions below would help to define it. *Id.* at 351–52. The court relied heavily on the zoning board's power under Connecticut law to find facts and apply zoning regulations to those facts, and to review the town's decision de novo. *Id.* at 352. Accordingly, the court applied the finality requirement, and because the plaintiffs did not request a variance or appeal the cease-and-desist order to the zoning board, the court held that no final decision had been rendered. *Id.*

In *Insomnia*, we held that the requirement to file a new plan is not an immediate injury in the context of an administrative process voluntarily instigated by the plaintiff. *Insomnia*, 278 F. App'x at 615-16. The plaintiff corporation alleged that the Land Use Control Board ("LUCB") denied its application to subdivide two parcels of land into three out of hostility to the "adult entertainment" industry. The LUCB instructed Insomnia Inc. to resubmit its application as a planned development instead of a subdivision, which would allow closer regulation of the property. *Id.* at 611. Insomnia Inc. appealed the denial to the Memphis City Council, was denied, and then sued in federal district court claiming First and Fourteenth Amendment

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[2] Whether this should have been considered against the plaintiffs is questionable. While *Williamson County*'s holding was dependent on the local laws and the relative powers of local entities, it was clear that a land-owner does not have to seek an *appeal* of an initial determinative decision. The specific authority of the body that is "appealed to" is critical, as *Williamson County* explained by differentiating between finality and exhaustion. *See infra* Part II.C.

violations. Applying the reasoning from *Murphy*, we held that (1) Insomnia did not suffer an immediate injury because it could file a new plan per the LUCB's instructions, and (2) that the possible rejection of the new application would further refine the contours of Insomnia's claims and aid future judicial consideration. *Id.* at 615–16. We applied the finality requirement to Insomnia's claims, held that there was no final decision, and affirmed the district court's dismissal.

I believe that, taken in context of the record as a whole, Northville's actions went further than the actions of the municipal actors in either *Murphy* or *Insomnia*. Context is vital in these cases because First Amendment rights are subject to close protection. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Brennan, J., plurality opinion); *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009) (same). One reason First Amendment rights are stringently protected is "'the intangible nature o[f] the benefits flowing from the exercise of those rights; and the fear that, if those rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future.'" *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (quoting *Cate v. Oldham*, 707 F.2d 1176, 1188–89 (11th Cir. 1983)). "[C]onstitutional violations may [also] arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

Miles Christi has alleged sufficient "immediate harms" that it would be imprudent to apply the finality requirement to its claims. First, Miles Christi claims that it cancelled a Bible study on account of the pretextual police surveillance. This alleged harm occurred at a specific time in the past, and like the landowner's takings claim in *Lucas,* cannot be cured by a later administrative ruling. Second, it claims that Northville's threats to ticket cars parked on the grass and the potential for further civil infraction tickets "chilled" the Order's religious activities. This is likewise an immediate harm to protected First Amendment activities.[3]

Third, Miles Christi paid $5000 for an engineering estimate. Although in *Insomnia* we did not conclude that requiring the plaintiff to file a new development plan was a harm, that case is distinguishable because there it was the plaintiff who sought a change in use and voluntarily initiated the administrative process that then had to be followed until a final decision was rendered. Here, Miles Christi desires only to use its property as it always has and is allegedly being subjected to the review process on pretextual grounds; it is Frey's decision that necessitated this cost, and

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[3] These first two harms cannot be redressed by any relief that the ZBA may potentially provide. The majority dismisses these harms as ones that can be cured by an appeal to the ZBA, which may resolve the issue such that Miles Christi would not have to cancel any religious activities. Notwithstanding the majority's assertion, the ZBA's hypothetical relief would do nothing to cure the past harms that Miles Christi has already suffered. Thus, "the consequences of staying our hand" would be that Miles Christi's harms would never be redressed.

Miles Christi therefore suffers an immediate harm if its theory of the case is borne out.

Finally, Frey's decision put Miles Christi to the choice of submitting an expensive site plan or drastically curtailing or ceasing its protected activities. When it refused, it was ticketed, haled into state court, and now faces the potential of a civil fine. As noted, this case is not like *Insomnia*, or most other land-use cases, because Plaintiffs did not seek a change in use on their own and in fact claim that their use has not changed. It is also unlike *Murphy*, where the town had not yet taken the step of bringing the plaintiffs to court in order to subject them to a civil penalty. Here, Northville has tried to force Miles Christi into an expensive—and, Miles Christi claims, unwarranted—site review process and haled it into state court when it refused. Miles Christi has suffered immediate harm.

Miles Christi's claim that Northville's reasons are pretextual is supported by Northville's statement at oral argument that "football parties and tailgate parties" do not change "the residential nature of the use; whereas, what they're doing here, they're doing religious education and they're worshipping." When challenged by this Court counsel retreated from that statement, and I do not rest my conclusions on it; neither, however, can I simply ignore its troubling implications.

Because I would hold that Miles Christi has alleged sufficient immediate injuries, I need not address whether requiring Miles Christi to pursue additional administrative remedies would further define its allegations, and I would hold that the finality

requirement does not apply to its First Amendment claims.

C. Frey's decision was "final"

In order to determine if Miles Christi's remaining claims under equal protection, due process, and RLUIPA are ripe, we must determine if Miles Christi has received a final decision. I would hold that it has.[4]

As I have already noted, "the finality requirement is concerned with whether the initial decisionmaker has arrived at a definite position on the issue that inflicts an actual, concrete injury." *Williamson County*, 473 U.S. at 192. The developer in *Williamson County* sued the local land planning committee in a § 1983 action for an unjust taking of its property by the application of various land-use regulations. *Id.* at 175. After the developer received approval for a preliminary plat and spent considerable resources on initial construction, the planning commission changed several applicable zoning ordinances and applied those changes to the developer's final plat applications. *Id.* at 177–79. These new regulations arguably rendered the project economically unfeasible. The planning commission then rejected the revised plat on a number of grounds. Although the Board of Zoning Appeals

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[4] I would further note that my conclusion on the First Amendment claims is supported by this determination. *See Lucas*, 505 U.S. at 1012 n.3 (explaining that the plaintiff had received a final decision after holding that the requirement did not apply to his claims); *Guggenheim*, 582 F.3d at 1011–12 (holding that the prudential finality requirement did not apply, but noting that the conclusion was supported by the fact that the plaintiffs "substantially satisfied the *Williamson* requirements").

ruled in favor of the developer on appeal, the planning commission declined to follow the Board's ruling and rejected the final plat application. *Id.* at 181–82. The owner then filed suit under § 1983. A jury found for the developer, and the case was appealed all the way to the Supreme Court. The Court reversed, holding the matter unripe. *Id.* at 186. While the Court based its decision on two grounds, only the first, the finality requirement, is relevant here.[5]

Relying heavily on the specific local procedures, the Court held that the developer had not obtained a "final decision" because it did not apply for available variances from the Board or the commission. *Id.* at 188–89. Between the commission and the Board, the developer could have pursued up to five variances, any or all of which would have significantly ameliorated the commission's eight objections to the plat. This was critical because unless the developer applied for variances before submitting the plat for approval, the commission could reject the plat on any grounds, including those that could well be covered by variances. *Id.* at 190. Also, without knowing which regulations would or would not ultimately apply, a court could not determine whether the local rules would allow the developer to build his subdivision in an economically feasible way, and therefore neither a court nor a jury could value the taking.

The Court was careful to distinguish "finality," which was required, from "exhaustion," which was not.

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[5] The second ground required the owners to "utilize the procedures Tennessee provides for obtaining just compensation," a requirement not applicable to this non-takings suit. *Id.* at 186.

"[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definite position on the issue that inflicts an actual, concrete injury . . . ." *Id.* at 193. Exhaustion, however, "generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.* To illustrate the difference, the Court provided several examples. The developer would not have had to seek a declaratory judgment in state court to challenge the zoning actions because such an action would "clearly [be] remedial." *Id.* at 193. "Similarly, [the developer] would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking." *Id.* These procedures "would result in a judgment whether the Commission's actions violated any of [the owner's] rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow [the owner] to develop the subdivision in the manner [the owner] proposed." *Id.*

The Second Circuit has outlined four policy considerations that underlie the finality requirement in land-use cases:

> First, . . . requiring a claimant to obtain a final decision from the local land use authority aids in the development of a full record. Second, . . . only if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular

> parcel. Third, a variance might provide the relief the property owner seeks without requiring judicial entanglement in constitutional disputes . . . . Finally, . . . federalism principles also buttress the finality requirement. Requiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution.

Id. at 348 (internal citations omitted); *see Insomnia*, 278 F. App'x at 613 (citing *Murphy* factors).[6]

We have held plaintiff's RLUIPA and equal protection claims unripe where the plaintiff's position before the local land use authority was undefined. *Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 618 (6th Cir. 2008) (hereinafter "*Grace Church*"). In *Grace Church*, a local Christian church applied for a special use permit to operate a residential facility. 544 F.3d at 611. The town granted the permit, but with several restrictions. *Id.* When the commission investigated an alleged violation, the pastor appeared before the commission but had no comment. *Id.* Faced with the one-sided evidence, the commission revoked the permit, and the church did not seek reconsideration, apply for a new permit, or appeal. Instead, it filed suit

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[6] Notwithstanding the unfortunate phrasing of the second policy consideration, that the owner should "exhaust[] the variance process," *Murphy* recognized *Williamson County*'s distinction between finality and exhaustion. *See Murphy*, 402 F.3d at 349 (recognizing that *Williamson County* does not require futile or remedial "exhaustion").

a year later in federal district court claiming violations of RLUIPA and equal protection. The district court dismissed for lack of ripeness, and we affirmed. Relying on *Murphy*'s policy considerations, we found that the record was insufficiently developed because the church was essentially silent during the local proceedings. *Id.* at 616. Furthermore, the church had not availed itself of any of the available avenues for local relief, denying the town the opportunity to render a final decision. *Id.* Therefore, we dismissed the suit as unripe.

The district court held that because Miles Christi did not appeal Northville's decision to the ZBA or otherwise avail itself of the zoning process, it did not obtain a final decision. Miles Christi responds that the district court confused exhaustion with finality, that Frey was the initial decisionmaker as empowered by local regulations, and that her testimony for Northville is determinative of Northville's final position on the matter under Fed. R. Civ. P. 30(b)(6). Northville argues that the ripeness doctrine requires that Miles Christi obtain a decision from either the Planning Commission or the ZBA. It further argues that Frey did not make a final decision, asserting instead that Miles Christi's actions triggered the events and Frey merely determined the next procedural step under the regulations. Finally, Northville argues that the ZBA has authority to modify, reverse, or affirm actions on appeal, and an appeal would not be futile.

I again note that Northville and the majority improperly conflate Frey's intensity determination with the possible end result of the zoning process. Because the two issues are distinct, and because Miles Christi focuses its complaint on the former, we must

focus on Frey's decision and its effects. *See also Suitum*, 520 U.S. at 739 (distinguishing the determination that the petitioner's land fell within a protected zone from petitioner's possible option to apply for the right to transfer her building rights and focusing only on the former). After analyzing the decision and its effects, we must then examine Miles Christi's available administrative options and determine whether each is part of Northville's process for arriving at "final decisions," which would preclude a finding of finality, or whether they are purely "remedial," which would not. Just as *Williamson County* was guided by the contours of the local rules, so is my analysis here.

At the meeting with Fr. Bertolacci, Frey informed him that she had determined that Miles Christi's use of its property had intensified to the point where it had become a non-residential use. That determination was within her authority as Director of Community Development. As a result, Northville demanded a site plan and issued a civil infraction ticket when Miles Christi did not comply. As explained above, that ticket had the effect of haling Plaintiffs into state court.

Following Frey's determination and the issuance of the ticket, Miles Christi had a number of administrative options available to it. First, the Order could have appealed Frey's decision requiring a site plan to the ZBA under Northville Code § 170-41.4(A). This section allows for an "appeal" to the ZBA "by any person . . .affected by a decision of the . . . Director of Community Development." The ZBA would conduct a hearing, and could reverse or modify the decision "*only* if it finds that the action or decision appealed meets at least one of the following criteria: (a) [w]as arbitrary or

capricious; (b) [w]as based on an erroneous finding of fact; (c) [c]onstituted an abuse of discretion; or (d) [w]as based on [an] erroneous interpretation of this chapter." *Id.* at §170-41.4(A)(3) (emphasis added). This option is remedial.

While the majority opinion attempts to paint this option as something else—an "ordinance interpretation"—it is purely an "appeal," similar to the appeal available to the plaintiff in *Williamson County*, which the Supreme Court held the plaintiff did not need to exhaust to have a final decision. Here, the ZBA was not involved in making the initial decision and would be merely reviewing Frey's decision.[7] Although the ZBA's standard of review is not a dispositive factor, I would note that the review here would likely not be *de novo*, as in *Murphy*, but would be done with some level of deference. Miles Christi did not have to exhaust this option.

Second, Miles Christi could file with the Planning Commission a request for a waiver from, or modification of, the parking and landscaping requirements under Northville Code §§ 170-24.13 and 170-26.1(K), or seek a variance from the ZBA under §§ 170.41.4(A)(5) and (6). It is unclear whether Miles Christi could request such relief before filing a site plan, but given the review requirements that appears unlikely. It is clear that these options have not been explored, and that a final decision on how the parking

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[7] The majority opinion concludes, with minimal discussion of the local ordinances, that the ZBA is "empowered to participate in the decisionmaking process from the outset." A plain reading of the local ordinances and the facts of this case show that conclusion to be clearly wrong.

and landscaping regulations would apply has not been reached. However, none of these options can serve to modify Frey's intensity determination. Instead, they are remedial measures, designed to address only the *consequences* of Frey's determination. Miles Christi's claim all along, however, has been that the intensity determination, *itself*, was incorrect. These options, therefore, do not impact the finality of Frey's intensity determination, and Miles Christi did not have to exhaust them.

Finally, Miles Christi could file for permission from the Planning Commission or the ZBA to file a less-demanding site plan. Article 33 covers site plans, and exempts single family homes from having to submit one. *Id.* at § 33.2(A). The article, however, requires a "full site plan," not one of three less demanding options, when there is "[a]ny change in the use of the land or a building to a more intensive use, in terms of parking needs, noise, traffic volumes and similar impacts." *Id.* at § 33.2 (table). This article does not appear to contain a provision for less extensive review. Regardless, this option suffers from the same infirmity as the last, because Miles Christi would still be subject to Frey's decision that a more intensive use occurred, and even if the site plan requirement were less rigorous, the Order would still have to participate in a process it did not initiate or face the consequences for continuing its activities.

One thing Miles Christi could not do was file a request for a variance to be free from the site plan requirement. After a thorough review of the

regulations, I find no variance listed in §170-41.4(B)[8] that applies to this circumstance, nor is there any "catch-all" clause. Even if a use variance could provide relief, in order to qualify for such a variance Miles Christi would have to show that "the site cannot reasonably be used for any of the uses allowed under current zoning," something it clearly could not do. *Id.* at § 170-41.4(B)(6)(b). Applying for such a variance would be futile, as the ZBA does not have the authority to alter any of the terms of the ordinance. *Id.* at § 170-41.6.

Given these available options, I would hold that, while Miles Christi has not exhausted its opportunities for administrative relief, it has obtained a final decision sufficient to ripen its claims. Frey, the initial decisionmaker, was empowered as the Director of Community Development to make the decision she did for Northville. That decision is subject to local appeal, but exhausting appeals is not required under *Williamson County*. Other available actions would not change Frey's decision that Miles Christi's use of the property had become more intensive. Therefore, "the initial decisionmaker has arrived at a definite position on the issue that inflicts an actual, concrete injury," and Miles Christi has obtained a final decision.

This result is supported by *Murphy*'s policy considerations, because (1) the record on the narrow question is sufficient, (2) the regulation is being

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[8] The majority opinion repeatedly refers to the obligation of Miles Christi to seek "an ordinance interpretation or variance" yet, tellingly, never identifies a single ordinance interpretation or variance available to Miles Christi. The reason for this omission is simple—none exists.

applied to this parcel to require a site plan, and (3) the available variances do not provide the requested relief. The fourth factor, the respect for federalism, which is particularly strong in local land-use situations, does not support this conclusion, but no single factor is dispositive.

Frey's allegedly unwarranted decision also distinguishes this case from *Grace Church*. Unlike in that case, where the Church had sought the special permit and then refused to cooperate in developing a full record, Frey's decision thrust the site review requirement upon Miles Christi. The fact that Miles Christi did not participate in the process is irrelevant here because the very question before us is whether it can be forced to. Also, the parties developed a full record of the events leading up to Frey's decision in state court. The parties' positions are well defined and ready for adjudication.

Because Miles Christi suffered an immediate injury, the finality requirement does not apply. Even if it did, Miles Christi has obtained a final decision from the initial decisionmaker. I turn, finally, to the general ripeness standards to ensure that they are also satisfied.

D. Miles Christi's claim satisfies general ripeness requirements

As stated above, the general test for ripeness has been articulated as "two basic questions: 1) is the claim fit for judicial decision in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? and (2) what is the hardship to the parties of withholding court

consideration?" *Warshak v. United States*, 532 F.3d 521, 526 (6th Cir. 2008) (en banc) (internal alterations, quotation marks, and citation omitted).

Given the foregoing discussion and the substantial overlap in the inquiries, I conclude that these factors are satisfied. The concrete factual context is Northville's conduct, Frey's intensity determination, and the resulting harms alleged by Miles Christi. Because the majority withholds judicial consideration, Miles Christi will have no recourse but to engage in the zoning process it did not initiate and argues was unlawfully required, and which cannot provide a complete remedy, or to cease or scale back its religious activities in the hope of avoiding future problems. Even the latter approach, however, will not prevent Miles Christi from being fined in the already progressing state court suit. Accordingly, I would hold that Miles Christi's claims are ripe, and that the district court erred in dismissing them.

III.

I would reverse the district court's dismissal for lack of subject matter jurisdiction and remand for further proceedings. Accordingly, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-1618

[Filed December 21, 2010]

MILES CHRISTI RELIGIOUS ORDER, CESAR BERTOLACCI, Father, and FRANCISCO CONTE-GRAND, Brother, Plaintiffs - Appellants,	)
v.	)
TOWNSHIP OF NORTHVILLE, CHIP SNIDER, in his official capacity as Northville Township Manager, JENNIFER FREY, in her official capacity as Director of Community Development for Northville Township, JOSEPH BAUER, in his official capacity as Ordinance Enforcement Officer for Northville Township, Defendants - Appellees.	)

Before: BATCHELDER, Chief Judge;
SUTTON and KETHLEDGE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number: 07-14003

[Filed April 30, 2009]

MILES CHRISTI RELIGIOUS ORDER, FATHER CESAR BERTOLACCI, and BROTHER FRANCISCO CONTE-GRAND,

Plaintiffs,

v.

NORTHVILLE TOWNSHIP, CHIP SNIDER, in his official capacity as Northville Township Manager, JENNIFER FREY, in her official capacity as the Director of Community Development for Northville Township, and JOSEPH BAUER, in his official capacity as Ordinance Enforcement Officer for Northville Township,

Defendants.

JUDGE PAUL D. BORMAN
UNITED STATES DISTRICT COURT

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON THE RIPENESS DOCTRINE

Before the Court is Defendants Northville Township, Chip Snider, Jennifer Frey, and Joseph Bauer's ("Northville Township" or "the township") Motion to Dismiss for Lack of Subject Matter Jurisdiction Based on the Ripeness Doctrine, filed October 7, 2008. (Doc. No. 31). The motion was fully briefed, and the Court held a motion hearing on January 28, 2009. For the reasons that follow, the Court **GRANTS** Defendants' motion to dismiss, and dismisses Plaintiffs' complaint without prejudice.

I. BACKGROUND

This case arises out of a land-use dispute between the Miles Christi Religious Order and Northville Township. Miles Christi alleges that Northville Township made a zoning determination, classifying the house, where Miles Christi priests and monks reside and conduct classes and services as a small church, and that this determination violates Plaintiffs' First Amendment religious, speech and expressive association rights, Plaintiffs' equal protection and due process rights, and similar rights guaranteed by the Michigan Constitution, and the federal Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. ("RLUIPA").

In fact, Northville Township has never made a final zoning determination classifying the house as a small church, and Plaintiffs have continued to conduct religious classes and services at the house.

Plaintiff Miles Christi is an international Catholic religious order approved by the Roman Catholic Church. (First Amended Complaint ¶¶ 6, 15 [hereinafter "Compl."]). It operates as a non-profit organization, incorporated under the laws of the State of Michigan and recognized by the Internal Revenue Service as a 501(c)(3) organization. (Compl. ¶ 6). Plaintiff Father Cesar Bertolacci is a Catholic priest and the local Superior of the Miles Christi religious order. (Compl. ¶ 9). Plaintiff Brother Francisco Conte-Grand is a Brother in the Miles Christi religious order. (Compl. ¶ 10).

Father Bertolacci and Brother Conte-Grand, along with other members of the Miles Christi religious order, reside in a house in a residential area of Northville Township that Miles Christi has owned and occupied since 2002. (Compl. ¶¶ 8-10). Miles Christi acquired the house through a donation by a Catholic religious order of sisters, who previously cared for the mentally handicapped at the residence. (Compl. ¶ 6).

Since 2002, six members of the Miles Christi religious order have resided in the home. (Compl. ¶ 8). Miles Christi holds regularly scheduled Bible study classes at the house throughout the week, and conducts Mass and the Sacrament of Penance in the chapel located in the home. (Compl. ¶¶ 17, 26). Miles Christi denies hosting public worship services at the home. (Compl. ¶ 29).

Beginning in 2003, Miles Christi's neighbors started complaining to the township about Miles Christi's use of the property, most specifically addressing the number of vehicles parked at the house. (Defs.' Mot. Ex. E, resident letters). The

township investigated but did not initially find any problems with Miles Christi's use of the property. (Compl. ¶ 40). During the investigation, Plaintiff met with Maureen Osieki, the Northville Township Planner, regarding Miles Christi's use of the property. (Compl. ¶ 43). Ms. Osieki advised Plaintiffs to write a letter to the Northville Township Clerk, introducing themselves as a religious community and informing the clerk about their ownership and use of the property. (Compl. ¶ 44). Plaintiffs were told that once the clerk received the letter, the township would determine whether Miles Christi's use of the property complied with the township's zoning ordinances. (Compl. ¶ 44).

The letter Plaintiffs sent to the township clerk described Miles Christi as a religious order, which is a "religious family, with strong and permanent bonds, which are the religious vows according to the rules of the Church." (Defs.' Br. Ex. G, Miles Christi letter). Plaintiffs stated that the house is meant to a private residence for the priests and brothers of Miles Christi. (Id.) Plaintiffs also revealed that the house contains an "oratory" where Mass and confession may be celebrated. (Id.) Plaintiffs stated that they conduct Mass every day at the oratory, and "welcome everyone" although usually only friends and family attend Mass in the oratory, which can only seat 10 guests. (Id.) Plaintiffs further wrote that "small activities for our friends" are held occasionally or on a weekly basis at the home. (Id.)

A few days after Plaintiffs sent their letter, Ms. Osieki told that the Northville Township Zoning Board had decided that their use of the property was in

compliance with the township's zoning ordinances and regulations. (Compl. ¶ 46).

Neighbors continued to complain, however, and Plaintiffs allege that "as the neighbor's complaints intensified, so did Defendants' desire to find an ordinance violation." (Compl. ¶ 52). Defendants began observing the property in 2003, and kept notes of the number of cars parked at the residence, the time of day the cars were present and the license plate numbers of the vehicles. (Compl. ¶ 52).

Defendant Joseph Bauer, the Northville Township Ordinance Enforcement Officer, visited the property to investigate the neighbor complaints in February 2007. (Compl. ¶ 54). Officer Bauer did not find any ordinance violations during his visit. (Compl. ¶ 54).

Following Officer Bauer's visit, the township increased its surveillance of the property to include uniformed police officers in marked police vehicles watching and photographing the property. (Compl. ¶ 55). Plaintiffs allege that as a result of the increased police presence, they canceled one of their Bible study groups and limited visits by friends and supporters. (Compl. ¶ 57).

On February 27, 2007, Plaintiffs received a letter from Officer Bauer informing them that the surveillance revealed that vehicles were parked on grassy areas of the property, in violation of a parking ordinance, Article 26. (Compl. ¶ 58). Officer Bauer also asked Plaintiffs to provide detailed specifications of the oratory. (Compl. ¶ 58).

In a letter dated March 1, 2007, Father Bertolacci reported that the oratory was 20 feet by 15 feet, with six pews and capacity of 18 people. (Defs.' Br. Ex. K, Bertolacci letter). Father Bertolacci also wrote that faith-based groups regularly met at the house during the week, and that volunteer opportunities took place at the house regularly during the week. (Id.)

Two weeks later, Defendants Chip Snider, the Northville Township Manager, Jennifer Frey, the Northville Township Community Planning Director, and Officer Bauer met with Plaintiffs. (Compl. ¶ 59). At the meeting, Ms. Frey stated that Plaintiffs' use of the property, as described in Father Bertolacci's letter, resembled a small church or place of worship under the zoning ordinances. Ms. Frey stated a concern with Plaintiffs' intensified use of the property, and asserted they would have to go through the township's site plan approval process. (Compl. ¶ 60; Defs.' Br. Ex. V2, Frey Testimony 54-55). At the end of the meeting, Ms. Frey asked Plaintiffs to contact Officer Bauer within 30 days, and tell him how Plaintiffs wanted to proceed. (Bertolacci Dep. 38; Defs.' Br. Ex. N, Frey Aff. 14). Ms. Frey also told Plaintiffs that they had 60 days to submit a site plan and/or apply for a zoning variance. (Frey Aff. ¶ 14). Plaintiffs did neither. They did not submit a site plane, and they did not apply for a zoning variance.

After the meeting, Miles Christi hired an engineering firm to estimate the costs of renovating the property to comply with what Miles Christi believed were the relevant zoning code requirements. (Compl. ¶ 64). Plaintiffs state that the estimate cost $5,000, and allege that the extensive renovations to the exterior of the property that the engineering firm

recommended would cost in excess of $80,000. (Compl. ¶ 66). Plaintiffs did not discuss the estimate/plan with the township.

To recapitulate, Miles Christi never submitted a site plan, nor did Plaintiffs apply for a zoning variance. (Defs.' Br.Ex. S1, State District Court Tr. Vol. I, 13, Sept. 12, 2007). On June 5, 2007, Officer Bauer issued a civil infraction ticket to Miles Christi for failure to submit a site plan application to the township, in violation of Zoning Ordinance § 170-33.3. (Id.; Defs.' Br.. Ex. M, civil infraction ticket). Per Defendants, "[t]he civil infraction ticket commenced legal proceedings to enforce the Township's site plan review procedures based on the conclusion that, under § 170.33.2, Miles Christi had changed the use of the Property from a mere residence to a more intensive non-residential use resembling a small church or place of worship." (Defs.' Br. 7).

Plaintiffs challenged the ticket in state district court. (State District Court Tr. Vol. I 3). The state district court invited the Plaintiffs to raise and brief the federal constitutional issues in that court. However, Plaintiffs' counsel requested rejected that invitation and an adjournment in order to file a constitutional challenge to the ticket in federal court. (Id. at 4-6). The state district court denied the adjournment. (Id. at 4-6). Plaintiffs' counsel represented to the court that he was ready to proceed with the hearing to determine the facts of the case, while noting that he was going to subsequently file a suit in federal court raising the federal constitutional and statutory issues. (Id. at 4).

After hearing testimony from Officer Bauer, two of the complaining neighbors, Gail and Gerald LeVan, and Jennifer Frey, the Northville Township Director of Community Development, the state district court judge rendered an opinion from the bench. (Id. at 5; Defs.' Br. Ex. W, State District Court Tr. Vol. II, 99, Sept. 24, 2007). The court held that the ordinance governing more intense use was "overly vague and subjective," and concluded that the township had not shown that a change in use had occurred. (Id. at 99-100, 103-105).

The township appealed to the Wayne County Circuit Court. (Defs.' Mot. Ex. P, Opinion, Aug. 11, 2008). The state circuit court judge reversed the state district court's decision, holding that the zoning ordinance is not vague and that the township met its evidentiary burden of showing that a change in use of the property occurred. (Defs.' Mot. Ex. P, Opinion, 5, 9, Aug. 11, 2008). The case was then remanded to the state district court for further proceedings. (Id. at 9). Per a stipulated order by the parties, the state district court litigation has been stayed pending the outcome of this case and all related appeals. (Doc. No. 47). Plaintiffs continue to conduct the regularly scheduled Bible classes and religious services; the former are noticed to the public on the Plaintiffs' website.

Plaintiffs filed suit in this Court on September 21, 2007. (Doc. No. 1). Plaintiffs' First Amended Complaint, filed December 3, 2007, alleged the following claims:

Count I: Religious Land Use and Institutionalized Persons Act of 2000
Count II: Free Exercise -- First Amendment
Count III: Freedom of Speech - First Amendment

Count IV: Freedom of Expressive Association First Amendment
Count V: Equal Protection Fourteenth Amendment
Count VI: Due Process - Fourteenth Amendment
Count VII: Religious Discrimination/Equal Protection - Michigan Constitution
Count VIII: Expressive Assembly and Association - Michigan Constitution
Count IX: Free Exercise - Michigan Constitution.

In the instant motion, Defendants ask this Court to dismiss Plaintiffs' complaint because Plaintiffs' claims are unripe for review.

II. ANALYSIS

Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction), 12(b)(6) (failure to state a claim) and 12(c). Fed.R.Civ.P. 12(b) (1) states in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter. . . .

When subject matter jurisdiction is challenged on a motion to dismiss, it is the plaintiff's burden to prove the existence of subject matter jurisdiction. *Rogers v. Stratton Indus.*, 798 F.2d 913, 915 (6th Cir. 1986). Because Defendants argue that Plaintiffs' claims are

unripe, this Court construes Defendants' motion to dismiss as a motion to dismiss the complaint, under Fed. R. Civ. 12(b)(1), based on a lack of subject matter jurisdiction.

Defendants argue that Plaintiffs' claims are not ripe for adjudication because they have not obtained a final decision from the township regarding the type and extent of the regulation of the property. (Defs.' Br. 13). Plaintiffs respond that their claims are ripe for adjudication because they do not have to exhaust administrative remedies before filing an action pursuant to 42 U.S.C. § 1983. (Pls.' Resp. 14). Plaintiffs also contend that the finality requirement has been met because Ms. Frey, the initial decisionmaker arrived at a definitive position, which caused Plaintiffs to suffer an actual injury, i.e. a chilling effect on their First Amendment activities, and any appeal to the zoning board of appeals would be remedial in nature. (Pls.' Resp. 15-16).

When deciding whether a claim is ripe for adjudication, the United States Court of Appeals for the Sixth Circuit instructs courts to consider three factors: 1) the likelihood that the harm alleged by the plaintiff will ever be inflicted; 2) whether the factual record is sufficiently developed to facilitate a fair adjudication of the claims' merits; and 3) the hardship to the parties if the court denies judicial relief at this stage of the proceedings. *Adult Video Ass'n v. United States Dept. of Justice*, 71 F.3d 563, 568 (6th Cir.1995) (internal citations omitted).

In a Fifth Amendment takings case, the United States Supreme Court articulated a more specific test for determining ripeness in cases involving the alleged

taking of a property interest: 1) the governmental entity must have reached a final decision regarding the application of the regulations to the property; and 2) the plaintiff must have sought compensation using the procedures implemented by the state. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194 (1985).

The Sixth Circuit has since extended the first prong of the ripeness test articulated in *Williamson County* to other types of constitutional claims involving land use disputes. *Grace Community Church v. Lenox Township*, 544 F.3d 609, 615 (6th Cir. 2008), citing *Insomnia Inc. v. City of Memphis*, 278 Fed. Appx. 609, 613-14 (6th Cir. 2008) (observing that the Sixth Circuit has applied the finality requirement to equal protection, substantive and procedural due process and takings claims arising from land use disputes). Thus, "the government entity charged with implementing the regulations must have reached a final decision regarding the application of the regulations to the property at issue" before a plaintiff can bring a claim for constitutional violations arising from a land use dispute. *Insomnia*, 278 Fed. Appx. at 612.

In *Insomnia Inc. v. City of Memphis*, 278 Fed. Appx. 609, 613-14 (6th Cir. 2008), the Sixth Circuit applied the finality requirement in a First Amendment case arising from a land dispute. 278 Fed. Appx. at 615-616. In doing so, the Court adopted the two-part analysis the Second Circuit Court of Appeals used in *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2nd Cir. 2005).

In *Murphy*, the plaintiffs brought a First Amendment claim after they were served with a cease

and desist order prohibiting them from holding prayer meetings in their home. 402 F.3d at 350. The Murphy plaintiffs did not seek a variance from the zoning board of appeals prior to instituting their suit. *Id.* at 350. In applying the finality requirement, the Second Circuit first considered whether the plaintiffs experienced an immediate injury, and then considered whether requiring the plaintiffs to pursue "administrative remedies would further define their alleged injuries." *Id.* at 351. This Court notes that in the instant case there is no such "cease and desist" order.

The court decided that the *Murphy* plaintiffs had not suffered an immediate injury because, had they pursued an appeal of the cease and desist order with the zoning board of appeals, the appeal would have stayed the enforcement of the cease and desist order. *Id.* at 351. The court further concluded that the factual record was not sufficient to facilitate adjudication because "the resolution of the constitutional and statutory claims we are asked to consider here hinge on factual circumstances not yet developed." *Id.* at 351. As a result, the court held that it lacked jurisdiction over the plaintiffs' claims. *Id.* at 352.

In applying the *Murphy* two-part analysis to the facts in *Insomnia*, the Sixth Circuit found that the plaintiffs, landowners seeking to subdivide property to be used for the purposes of adult entertainment, had not suffered an immediate injury when the defendant city denied their application for subdivision. *Insomnia*, 278 Fed. Appx. at 615. The Court noted that the plaintiffs could file a renewed plan as a proposed development, which may be approved by the city, thereby mooting the plaintiffs' claim of First

Amendment retaliation. *Id.* The Court also concluded that if the plaintiffs' renewed plan as a proposed development is rejected, "this outcome will further define the contours of Plaintiffs' claim of First Amendment retaliation." *Id.* at 615-616.

Here, Plaintiffs raise First Amendment freedom of religion, speech and association claims, a due process claim, an equal protection claim and a claim under RLUIPA. It is undisputed that Plaintiffs did not appeal the township's determination that a change in use of the property had occurred – to a more intensive use– to the zoning board of appeals. In addition, Plaintiffs did not submit a site plan and did not seek a variance or other administrative relief from the zoning board of appeals. This case, therefore, is nearly identical to the factual scenarios presented in *Murphy*, 402 F.3d at 350, and *Insomnia*, 278 Fed. Appx. at 615.

First, because Plaintiffs did not appeal the Director of Community Development's decision that a change in use had occurred at the property to the zoning board of appeals, the township's final determination is unknown. Second, Plaintiffs did not suffer an immediate injury as a result of Defendants' actions, and the factual record is not sufficiently developed to produce a fair adjudication of the parties' claims.

. As in *Murphy*, 402 F.3d at 351, had Plaintiffs appealed Ms. Frey's, the Northville Township Director of Community Development, decision that a change in use had occurred at the property, the appeal would have stayed any action. (Defs.' Br. Ex. II, Northville Township Zoning Ordinance Article 41, § 170.41.4). Therefore, Plaintiffs would not have been required to

submit to the site plan review process, and they could not have been ticketed for failing to submit a site plan.

Furthermore, Plaintiffs have not suffered an immediate injury attributable to Defendants' actions. Plaintiffs' decision to cancel a Bible Study group on one occasion and limit the number of visitors to the property is not an immediate injury suffered as a result of Defendants' action; Defendants did not require, or even suggest that Plaintiffs limit the number of guests to the property. Plaintiffs were not subject to a cease and desist order. That Plaintiffs limited the number of people at the property on their own initiative was not mandated by Defendants. Further, Plaintiffs' response did not, and could not, cure the infraction for which the ticket was issued: failing to submit a site plan. The actions Plaintiffs took are not, therefore, attributable to a governmental "chilling" of speech. In addition, the Court reiterates that presently scheduled Bible classes and religious services are ongoing at the residence.

Similar to the plaintiffs in *Murphy*, 402 F.3d at 350, and *Insomnia*, 278 Fed. Appx. at 615-616, if Ms. Frey's decision is overturned by the zoning board of appeals, Plaintiffs' constitutional claims will likely be moot. If, however, Ms. Frey's decision is upheld, "this outcome will further define the contours of Plaintiffs' claim[s]." *Insomnia*, 278 Fed. Appx. at 615-616.

This case is distinguishable from *Murphy*, 402 F.3d at 350, and *Insomnia*, 278 Fed. Appx. at 609, by one fact. In this case, Plaintiffs challenged the ticket the township issued to them for failing to submit a site plan in state district court. However, the state district court has not rendered a decision, and the state

district court proceedings have been stayed by the parties. Therefore, the stayed district court litigation does not affect the ripeness analysis.

Plaintiffs cite a number of cases in support of their argument that their claims are ripe. Those cases are all distinguishable from the facts at bar.

Plaintiffs argue that *Williamson County*, 473 U.S. at 172, does not prevent them from turning directly to this Court for relief, and cite *Lamar Advertising Co. v. Township of Elmira*, 328 F. Supp. 2d 725, 732-35 (E.D. Mich. 2004) and *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214-15 (6th Cir. 1992), in support of their argument. (Pls.' Resp. 15).

In *Lamar*, an outdoor advertising company filed a § 1983 action against the township after the township refused to allow it to construct a billboard along a state highway. 328 F. Supp. 2d at 726-27. The court held that the township's refusal to issue the necessary building permits, on the basis of a later-enacted ordinance, was a unlawful prior restraint of commercial speech because the ordinance was not in effect at the time Lamar filed its application to construct the billboard. *Id.* at 733-34. Because Lamar applied for the building permits before the township ordinance was enacted, the township was required as a matter of law to issue the building permits, and its refusal to do so was a violation of the First Amendment. *Id.* at 734.

Lamar is distinguishable from the present case for two reasons: 1) this is not a case where the plaintiff is entitled to continue or move forward with its activities as a matter of law; here, there is a factual question

about whether Plaintiffs' activities constitute a more intense use of the property under the township's zoning ordinances; and 2) *Lamar* was decided before *Insomnia,* 278 Fed. Appx. at 609, and *Grace Community Church*, 544 F.3d at 609, in which the Sixth Circuit expanded the *Williamson County* ripeness test to First Amendment claims.

Pearson was also decided before *Insomnia* and *Grace Community Church*. In *Pearson*, a landowner sued Grand Blanc for denying his request for rezoning of a property, which the landowner alleged constituted a denial of substantive due process. 961 F.2d at 1214. The Sixth Circuit held that, "the very existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for federal adjudication." *Id.* at 1215. However, in *Insomnia* and *Grace Community Church*, the Sixth Circuit clearly indicated a shift in jurisprudence governing the review of state zoning actions, which requires landowners to obtain a final determination on a zoning issue before coming to federal court. Further, in the instant case, the township zoning board has not ruled on any zoning determination made by Ms. Frey.

Plaintiffs also argue that the ripeness requirement is relaxed for First Amendment claims. (Pls.' Resp. 16). Plaintiffs primarily rely on a recent Sixth Circuit opinion, *Warshak v. United States*, 532 F.3d 521, 533 (6th Cir. 2008), in support of their proposition.

In *Warshak*, the plaintiff was a suspect in a criminal investigation, during which the government obtained his emails without a warrant. *Id.* at 524. Warshak, after discovery the government's actions, filed a declaratory judgment action alleging violations

of the Fourth Amendment and the Stored Communications Act. *Id.* at 523.

The Sixth Circuit held that Warshak's constitutional claim was not ripe. *Id.* at 523. The Sixth Circuit explained that a controversy no longer existed because "we have no idea whether the government will conduct an *ex parte* search of Warshak's email in the further and plenty of reason to doubt that it will . . . ." *Id.* at 526. The Sixth Circuit further held that there was no meaningful risk of hardship to Warshak if the court did not consider his claim. *Id.* at 531. The Sixth Circuit explained that hardship occurs when a claimant faces a choice between immediately complying with a burdensome law or risking serious criminal and civil penalties. *Id.* at 531. The Court noted that in a First Amendment claim the ripeness requirements might be relaxed but Warshak had not alleged a First Amendment violation. *Id.* at 533.

In certain First Amendment cases, it may be appropriate to relax the ripeness requirement. This is not such a case. As discussed above, there is no meaningful risk of hardship to Plaintiffs if this Court does not consider their claims. Plaintiffs are not faced with a choice to immediately comply with a burdensome law, or risk serious criminal and civil penalties. Plaintiffs could have avoided the civil infraction ticket, and can still forestall the enforcement of the Defendants' initial determination of more intense use which requires an examination of the land use, by appealing to the Zoning Board of Appeals, which stays enforcement. Appealing the initial determination of the official will either resolve the case in favor of Plaintiffs or will further develop the factual record and refine Plaintiffs' constitutional

claims. Either way, Plaintiffs must fully avail themselves of the zoning board of appeals process, or otherwise show that a final determination has been made, before pursuing their claims in federal court. Significantly, Plaintiffs are continuing to pursue their religious activities at the residence.

Plaintiffs further contend that even a momentary loss of First Amendments rights constitutes irreparable harm. Plaintiffs cite to *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989), in support of their argument.

In *Elrod*, Cook County Sheriff's Office employees sued for violations of the First and Fourteenth Amendments after they were fired or threatened with dismissal for not being affiliated with the political party of the sheriff. 427 U.S. at 347. The Supreme Court held that firing or threatening dismissal for partisan purposes violates the First Amendment. *Id.* at 359-60. The Supreme Court also upheld an injunction entered by the lower court preventing further action by the sheriff's office because the plaintiffs' First Amendment rights were either threatened or in fact impaired when the injunction was sought. *Id.* at 373.

In *Newsom*, a group of inmate advisors filed to suit after a prison warden refused to reappoint the inmate advisors when their respective terms expired. 888 F.2d at 372. The inmate advisors alleged that the warden refused to reappoint in retaliation for complaint they had filed with the warden regarding the performance of the chairman of the disciplinary board. *Id.* at 373.

The Sixth Circuit affirmed the district court's decision that the inmate advisors suffered irreparable injury from the infringement of their First Amendments rights, and that injury continued even after termination. *Id.* at 378. To reach its conclusion, the Sixth Circuit relied on the Supreme Court's statement in *Elrod v. Burns*, 427 U.S. at 373, that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 378.

Unlike in *Elrod*, 427 U.S. at 373, and *Newsom*, 888 F.2d at 372, Plaintiffs' First Amendment rights have not been threatened or impaired by the township's actions. Plaintiffs, on their own initiative, canceled one Bible Study group; they continue to hold multiple weekly Bible Study groups on the property, scheduled on their internet website. The township's decision to require a site plan is not an impairment of Plaintiffs' First Amendment rights. Plaintiffs' more intensive use of the residential property is what triggered the township's decision to require a site plan. In *Elrod* and *Newsom*, the plaintiffs all suffered First Amendment injuries when a government actors deprived them of employment due to their decision either to speak or not speak. Plaintiffs have not shown that a similar deprivation or injury has occurred at the hands of the township.

Although this Court's discussion largely centers on Plaintiffs' First Amendment claims, Plaintiffs' equal protection, due process and RLUIPA claims are also not ripe for adjudication, for the same reasons as discussed above. *See Insomnia*, 278 Fed. Appx. at 613-14 (noting that the Sixth Circuit has applied the finality requirement to equal protection, substantive

and procedural due process and takings claims arising from land use disputes); *Grace Community*, 544 F.3d at 618 (affirming the district court's dismissal of the plaintiff's RLUIPA claim as unripe where the plaintiff had not obtained a final decision from the zoning board of appeals and the factual record was not sufficiently developed).

III. CONCLUSION

This Court holds that Plaintiffs claims are not ripe.[1] Plaintiffs have not participated in the zoning appeals process and, therefore, have not received a final determination from the township. Moreover, Plaintiffs have not suffered an immediate injury attributable to Defendants' actions. Thus, this Court grants the township's motion to dismiss Plaintiff's constitutional claims without prejudice.

SO ORDERED.

S/Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: April 30, 2009

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[1] This case is not factually comparable to *Brown v. City of Ecorse*, No. 08-1041, 2009 WL 1098715 (6th Cir., April 23, 2009), where the City refused to grant the Plaintiff permits to construct modular homes and the City's zoning ordinance gave its Building Department the discretion to reject his application for those permits. Under those facts, the Sixth Circuit found the case to be ripe for adjudication. *See id.* at 4 n. 6.

[Certificate of Service omitted in printing this appendix]

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case No. 2:07-cv-14003-PDB-VMM

[Filed April 30, 2009]

Miles Christi Religious Order, et al.,	)
	)
Plaintiff(s),	)
	)
v.	)
	)
Northville, Township of, et al.,	)
	)
Defendant(s).	)
	)

Hon. Paul D Borman

JUDGMENT FOR DEFENDANT(S)
Decision by Court

This action came to trial or hearing before the Court. The issues have been duly tried or heard and a decision has been rendered.

The Court has ordered that Plaintiff(s) recover nothing, the action be dismissed on the merits, and the Defendant(s) recover costs from Plaintiff(s).

DAVID J. WEAVER, CLERK OF COURT

By: s/ D. Goodine
Deputy Clerk

Dated: April 30, 2009

Approved as to form:

s/ Paul D Borman

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-1618

[Filed January 24, 2011]

MILES CHRISTI RELIGIOUS ORDER, ET AL.,	)
Plaintiffs-Appellants,	)
v.	)
TOWNSHIP OF NORTHVILLE, ET AL.,	)
Defendants-Appellees.	)

ORDER

BEFORE: BATCHELDER, Chief Judge; SUTTON and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Chief Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk